

The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm

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The American with Disabilities Act (ADA) was premised in many ways on the traditional model of the civil rights statutes. Because this model does not serve to provide equal opportunities for people with disabilities, Congress expanded it by requiring that reasonable accommodations be provided for individuals with disabilities. Professor Tucker looks at this expansion and discusses the underlying conflict between this expansion and the civil rights premise.

Professor Tucker discusses how it may have been better for Congress to premise the ADA on more basic "human rights" principles rather than the stated civil rights principles. She also discusses court cases that have slowed the progression of the positive ramifications of the ADA for individuals with disabilities. The real change in the treatment of people with disabilities, she suggests, will come from educating not only the courts but the public-at-large on the true meaning of civil rights for people with disabilities.

I. INTRODUCTION

Since Congress first began considering passage of the bill that became the Americans with Disabilities Act of 1990 (ADA),¹ I have struggled with the premises underlying the civil rights paradigm of the ADA. As a person with a disability by any reasonable definition of that term (I have been profoundly deaf since infancy and have never been able to benefit from hearing aids), I became a willing convert to, and ultimately an avid supporter of, the concept of "civil rights" for people with disabilities. Frustrated with being repeatedly excluded from mainstream society,² I was more than ready to embrace any concept that would open society's doors to me and other people with disabilities. I was all too willing to jump on the bandwagon to support the passage of a law requiring "equal rights" for people with disabilities similar to laws requiring "equal rights" for members of minority races.

I did not come to this bandwagon lightly. I had spent more than forty years struggling to adapt as a lone deaf person in this hearing world (I do not use sign language, but lip-read, and I did not get to know another deaf person until I was in my mid-to-late thirties). My entire life had been premised on the belief that the disability was mine, and thus it was my responsibility to compensate as best as

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¹ Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1994).

² One who is deaf inevitably suffers from such exclusion on a daily basis. See, e.g., BONNIE P. TUCKER, *THE FEEL OF SILENCE* (1995).

possible for that disability. Society was not responsible for my deafness, and thus society was not responsible for changing the world to meet my needs. All the adapting was my responsibility. Who said life was supposed to be fair? In short, I had spent over forty years wholeheartedly supporting the “medical model” of disability, under which the focus is on “rehabilitating” or changing the person with a disability rather than on changing society.³

As more and more commentators began to reject the medical model of disability and to look at disability in the context of a social problem that society as a whole should bear responsibility for rectifying, I became persuaded—indeed, I wanted to be persuaded—to accept that reasoning. After all, the disability was no more my “fault” than it was society’s “fault.” Why should all responsibility relating to that disability be mine alone, not to be shared by society? Why not do what is required to open mainstream society to *all* people, with and without disabilities, rather than requiring people with disabilities to do the impossible by seeking to “correct” uncorrectable disabilities? Why not at least *try* to create Utopia?

Although I came to recognize the need for, and to support, the concept of civil rights for people with disabilities, I remained somewhat skeptical about the prospects for success of a civil rights movement aimed at providing individuals with disabilities with equal rights and opportunities. Utopia sounded wonderful, but I questioned whether the public at large would accept the notion of redefining and reorganizing society to make it truly accessible to people with disabilities. While I believed that a majority of people would find the general concept acceptable, I was skeptical as to whether most people would pay more than lip service to that concept when confronted with the reality that creating Utopia would require them to spend money or take action that might disrupt their daily lives. Desperately desiring admission to mainstream society, however, I resolved to be optimistic. We would have a *law* that *required* people to pay the necessary expenses and take the necessary actions to create a world accessible to everyone,

³ See, e.g., Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213 (2000); Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341 (1993). I, like many other people with disabilities, had steadfastly rejected the “charitable model” of disability, under which people with disabilities are viewed as helpless and in need of charitable intervention and/or patronage to survive. See, e.g., SUSAN NUSSBAUM, *MISHUGANISMO*, Scene 3, reprinted in *STARING BACK: THE DISABILITY EXPERIENCE FROM THE INSIDE OUT*, 375 (Kenny Fries ed., 1997) (“Disabled people aren’t brave to wanna live their lives, they’re just sick of holding that tin cup out all the time.”); 136 CONG. REC. H4627 (daily ed. July 12, 1990) (Representative Oberstar, speaking in favor of the ADA’s enactment, noted that “the disabled do not want charity or a government handout; they want to work.”).

at least within the bounds of reason. The courts would be *required* to enforce that law and ultimately we would create some reasonable version of Utopia.

Ten years after enactment of that law—the ADA—a reasonable Utopia has not yet been created. As some of us had feared,⁴ many individuals and entities are not yet willing to spend money or disrupt their lives to benefit someone or some group other than themselves.⁵ The ADA was enacted ahead of its time, in

⁴ See 2 BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW 21:3 n.11 (1991).

⁵ An illustrative situation is found in *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538, 546 (7th Cir. 1995), where the court refused to require an employer to pay \$150 to renovate a sink to permit its use by a disabled employee; the state defendant preferred to spend thousands of dollars on litigation rather than to renovate the sink.

It is not surprising that people who are “strangers” to disability reject the notion that some facets of society must bear the cost or inconvenience of making society accessible to people with disabilities. I sometimes tell the following story to students in my disability law class: About three years ago I bought my mother two tickets to see the play “Bye Bye Birdie” for her birthday. The friend my mother had planned to take to the play canceled about two weeks before the performance, which was being staged at a state university theater. I had never really seen a play before, due to the inability to lipread what the performers are saying on the stage—even if I sit front and center the actors are usually too far away, often do not face the audience but face the co-actors with whom they are speaking, and often have microphones blocking their lips. (I had sat through a couple of plays when my physical presence was required for political reasons, but had never been able to follow or enjoy the performance.) I thought this might be a good opportunity to see how ADA Title II was working while at the same time keeping my mother company at the play. So, I asked the theater manager if the theater would provide me with an oral interpreter for the performance. The manager was very cooperative. I met with a technical employee of the theater, and we tried to figure out where the oral interpreter would sit and how she would orally interpret in the dark. We came up with several possible scenarios, which I left to the theater to choose from, and I told my mother I would accompany her to the play. My mother wanted to know how this was going to work. “Who would pay for the interpreter?” asked my mother. “The theater,” I replied. “How much would that cost?” queried my mother. “Probably about \$60,” I opined. “Where will the interpreter sit?” asked my mother. “There are several possibilities, but probably she will sit on the seat on one side of me, while you sit my other side.” I replied. My mother was aghast. “You paid about \$50 for your ticket to the play,” Mother said. “Now you are telling me that the theater owner has to pay an interpreter \$60 dollars for you to hear the play, and the interpreter will occupy another \$50 seat. That means that the theater is *losing* \$60 dollars due to your attendance at the play. What kind of a law is that?” remarked Mother. I tried to explain to my mother that the \$110 cost to the theater was not to be compared to the \$50 I had paid for my ticket, but was to be factored into the theater’s entire revenues and viewed in the context of one item in the theater’s overall costs of doing business. But my mother, who has two deaf children and whose husband became deaf at the age of fifty, so she is no stranger to disability, did not find that logic palatable. And I have to admit that, although I attended and enjoyed the play, I felt so uncomfortable about requiring the theater to go to that expense on my behalf that I have not been to another play since. If my mother is aghast, and I am uncomfortable, how can we expect “strangers” to disability to accept the principles upon which the ADA is premised?

that much of the country is not yet ready to embrace the precepts on which the ADA is premised. And the ADA has not yet succeeded in requiring many people and entities to do what they do not wish to do—for one primary reason: many, perhaps most, courts are not enforcing the law, but instead are finding incredibly inventive means of interpreting the ADA to achieve the opposite result that the Act was intended to achieve.⁶ Judges are only people, generally people without

⁶ There are a vast number of law review articles discussing the disappointing “failure” of the ADA to achieve its goals to date. *See, e.g.*, Robert L. Burgdorf, Jr., “*Substantially Limited*” *Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 415 (1997) (discussing the courts’ misconstruction of the ADA’s definition of disability and the manner in which such decisions represent a “considerable journey down the wrong road”); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (noting that the overwhelming number of cases filed under ADA Title I have been decided in favor of defendants on motions for summary judgment); Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000) [hereinafter Colker, *Fragile Compromise*] (noting that ADA Title III has proven largely ineffective because (i) it provides only for injunctive relief, and thus few lawsuits have been brought under Title III, and (ii) those courts that have heard cases under Title III have heavily favored defendants and have narrowly interpreted the rights of people with disabilities under the Act); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19 (2000) (noting that ADA Title I has not accomplished its goals, and suggesting possible reasons for the fact that court decisions have heavily favored plaintiffs—often for nonsensical reasons); Arlene B. Mayerson, *Restoring Regard for the “Regarded As” Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587 (1997) (discussing the courts’ restrictive interpretations of the “regarded as” prong of the ADA’s definition of the term “disability,” and stating that such restrictive judicial interpretations “reflect, at best, a lack of understanding of the statute and, at worst, a blatant hostility towards” the ADA’s goals); James P. Colgate, Note, *If You Build It, Can They Sue? Architects’ Liability under Title III of the ADA*, 68 FORDHAM L. REV. 137 (1999) (discussing the manner in which the trend toward judicial backlash against the ADA has impacted the issue of architect liability under the Act). *See also* Kathryn Moss, et al., *Outcomes of Employment Discrimination Charges Filed under the Americans with Disabilities Act*, 50 PSYCHIATRIC SERVICES 1028, 1034 (1999) (presenting results of a comprehensive research study that showed that the vast majority of employment discrimination charges filed under ADA Title I were not resolved in favor of the plaintiffs).

With respect to articles discussing the extremely large percentage of reported cases that have been decided in favor of ADA defendants, however, it is important to note, as Professor Colker has explained, Ruth Colker, *Winning and Losing under the ADA*, 62 OHIO ST. L.J. 239 (2001) [hereinafter Colker, *Winning*], that analyzing the issue by looking to reported cases alone may be misleading. Reported cases are generally appellate cases, not trial court cases, and defendants may only rarely appeal trial court verdicts in favor of plaintiffs due to the difficulty of showing that a jury’s verdict was clearly erroneous. The reported cases, therefore, do not necessarily evidence the number of instances in which plaintiffs have prevailed at the trial level in ADA cases. *Cf. Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 403 (May-June 1998) (reporting that a study of over 1,200 ADA Title I cases undertaken by the Commission on

disabilities, who are not yet willing to change the rules of society to require themselves or others to act as good Samaritans. Unless a law clearly and emphatically states that people must act as good Samaritans, most judges will not interpret that law to require such action. The ADA appears to waffle on this point, and thus gives the courts sufficient leeway to reject the real principles upon which the Act was founded and to interpret the Act in a manner that is in accord with the courts' own values or beliefs.

Many different factors have been suggested as explaining the so-called "backlash" against the ADA. Some of these factors are based on economics;⁷ others are based on a variety of social concepts, ranging from outright judicial and societal hostility toward civil rights premises in general⁸ or to the ADA's premises specifically,⁹ to the inability of courts to understand the law,¹⁰ to fundamental differences between the judiciary and the legislature relating to the role the government should play in this area,¹¹ to a belief by the judiciary and the public-at-large that people with disabilities who seek accommodations are "narcissistic and egoistic,"¹² to a miscellany of other factors. Each of these suggested factors has undoubtedly contributed to the backlash. While tangentially addressing the issue of judicial backlash against the ADA, this paper is more concerned with inherent flaws in the ADA that provide the courts with a means of exercising that backlash.

It is easy and uncomplicated to "blame" the fact that to date the ADA has not achieved the goal of creating a generally accessible mainstream society on the failure of the courts to properly enforce the law. A more fundamental problem, however, may lie in the ADA itself—in the seemingly conflicting premises underlying the Act and the Act's failure to straightforwardly present its objectives. The ADA was artfully drafted, through a series of negotiations and compromises, in a highly charged political atmosphere.¹³ To ensure passage of

Mental and Physical Disability Law of the American Bar Association showed that employers prevailed in 92% of final judicial dispositions of such cases).

⁷ See, e.g., Marta Russell, *Backlash Can Be Reasonably Attributed: Backlash, the Political Economy, and Structural Exclusion*, 21 BERKELEY J. EMP. & LAB. L. 335 (2000) (suggesting that the backlash with respect to the employment provisions of the ADA is due to: (1) the fears of nondisabled workers that they will lose their jobs due to an influx of new workers with disabilities into the workforce, and (2) the unwillingness of business entities to pay the costs of accommodations for workers with disabilities).

⁸ See, e.g., Diller, *supra* note 6.

⁹ See, e.g., Mayerson, *supra* note 6.

¹⁰ See, e.g., Burgdorf, *supra* note 6.

¹¹ See, e.g., Colgate, *supra* note 6.

¹² Lennard J. Davis, *Bending Over Backwards: Disability, Narcissism, and the Law*, 21 BERKELEY J. EMP. & LAB. L. 193, 197 (2000).

¹³ See, e.g., NATIONAL COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE

the ADA, straightforwardness and clarity ultimately gave way to political reality, requiring some disingenuousness. The result of this necessary political maneuvering and disingenuousness was enactment of a law that many courts view as sending conflicting messages. The courts, in turn, have chosen to prioritize the message that comports with their own notions of fair play and to ignore the message that contravenes those notions.

This article will address the apparently conflicting premises underlying the ADA. In Part II.A, I will address the apparent conflict between the traditional concept of civil rights on which the ADA was modeled and the ADA's core requirement of reasonable accommodations, and provide examples of judicial decisions weakening or denying enforcement of the ADA that may reflect the courts' discomfort with those seemingly contradictory objectives. In Part II.B, I will address the reasons that the "race neutral" concept of civil rights laws is inapplicable to most cases involving different treatment of individuals with disabilities, and provide examples of the manner in which the "neutrality" model of the Civil Rights Act of 1964 has had an adverse impact on the ADA discrimination claims of individuals with disabilities. In Part III, I will discuss the positive effects resulting from the ADA, despite the Act's fundamental flaws, and offer some words of caution to prevent further backlash against the Act in general and people with disabilities in particular. In Part IV, I will conclude.

II. THE ADA'S SEEMINGLY CONFLICTING PREMISES

The ADA purports to be a civil rights law; it was premised on the concept of civil rights for individuals with disabilities.¹⁴ The Act was enacted both pursuant

MAKING OF THE AMERICANS WITH DISABILITIES ACT (1997) [hereinafter EQUALITY OF OPPORTUNITY]; Chai Feldblum, *Medical Examinations and Inquiries under the Americans with Disabilities Act: A View from the Inside*, 64 TEMP. L. REV. 521 (1991); Colker, *Fragile Compromise*, *supra* note 6, at 385. See also Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 391-92 (1991) (noting that the bill introducing the ADA "underwent much debate, negotiation, compromise, refinement, and revision before emerging in its final form," that the ADA "has been significantly modified since its original introduction," and that while "[m]any of those changes were for the better, some were not").

¹⁴ See, e.g., EQUALITY OF OPPORTUNITY, *supra* note 13; Feldblum, *supra* note 13, Weicker, *supra* note 13. Thus, the ADA was referred to as the "Emancipation Proclamation" for people with disabilities, and the Act's date of enactment was referred to as "Liberation Day for the Disabled." See e.g., A.Z. Horvath, *Disabled-Rights Bill Praised and Feared*, NEWSDAY, Sept. 9, 1989, at 2 ("Senate lead sponsor Tom Harkin (D. Iowa) called the [ADA] a '20th-century Emancipation Proclamation for people with disabilities'"); G. Elsasser, *Senate Ok's Rights Bill for Disabled*, CHI. TRIB., Sept. 8, 1989, § 1, at 1 (the ADA "is 'a 20th-century Emancipation Proclamation for people with disabilities,' said Sen. Tom Harkin (D-Iowa), the bill's chief sponsor"); S. Chapman, *Waving a Magic Wand at the Needs of the Handicapped*,

to Congress's power under the Fourteenth Amendment and the Interstate Commerce Clause¹⁵ to "provide a clear and comprehensive national mandate for the elimination of discrimination against people with disabilities."¹⁶ The entire focus of the Act is on equalizing the playing field for people with disabilities, so that people with disabilities have the same opportunities to participate in mainstream society as do people without disabilities. The ADA is *not* just a basic civil rights law, however. The term "civil rights," as that term has traditionally been defined and interpreted, is a misnomer in the context of the different treatment faced by people with disabilities.¹⁷

The ADA expanded the scope and principles of section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability by recipients of federal financial assistance.¹⁸ Section 504 was premised in large part on Title VI of the Civil Rights Act of 1964—a law that already existed to prevent employment discrimination on the basis of race by recipients of federal financial assistance.¹⁹ The ADA was premised in part on section 504 (and thus on Title VI of the Civil Rights Act): when enacting the ADA Congress borrowed the definition of disability utilized under section 504 and also borrowed some of the substantive provisions and defenses developed under that section.²⁰ The ADA was also premised, in part, on Titles II²¹ and VII²² of the Civil Rights Act: Congress extended coverage of the ADA to the

CHICAGO TRIBUNE, September 24, 1989, § 4, at 3 (the ADA has been dubbed "Liberation Day for the disabled").

¹⁵ 42 U.S.C. § 12101(b)(4) (1994).

¹⁶ § 12101(b)(1).

¹⁷ As two commentators have noted, "[m]any perfectly just claims . . . are NOT civil rights claims." MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 226 (1997).

¹⁸ Section 504 provides in pertinent part that:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794a (1994).

¹⁹ 42 U.S.C. § 2000d (1994). Title VI provides that:

"No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

²⁰ *Id.*

²¹ § 2000a (prohibiting discrimination on the basis of race, color, religion or national origin in specified places of public accommodation).

²² § 2000e-2(a) (prohibiting employers from discriminating in matters of employment on

private sector, as under Civil Rights Act Titles II and VII, and incorporated the Title VII remedies into ADA Title I. Congress also modeled Title III of the ADA after Title II of the Civil Rights Act—both Titles prohibit discrimination by public accommodations. When enacted in 1964, Titles II, VI and VII of the Civil Rights Act focused on prohibiting discrimination on the basis of race,²³ although all three titles also prohibited discrimination on the basis of color, religion, or national origin, and Title VII contained a “token” (at that time) prohibition of discrimination on the basis of sex.²⁴ To the extent that the ADA was modeled on the Civil Rights Act, the focus was on the Civil Rights Act’s prohibition of discrimination on the basis of race.²⁵

Professor Matthew Diller explains the reasons for premising the ADA (and presumably section 504) on the Civil Rights Act prohibition of discrimination on the basis of race as follows: (1) the Civil Rights Act provided an existing vocabulary and frame of reference upon which to base a law prohibiting discrimination on the basis of disability; (2) the civil rights framework gives nondisabled people a means of comprehending the problems faced by people with disabilities resulting from stereotypes and biases; (3) the civil rights framework establishes the concept of discrimination, under which it is impermissible for certain entities to act upon biases or stereotypes; (4) the civil rights model provides a judicial means of remedying discriminatory conduct; (5) use of the civil rights model allows people with disabilities to assert their claims

the basis of race, color, religion, sex or national origin).

²³ See generally CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT* (1985).

²⁴ See, e.g., Stephen F. Befort & Holly L. Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court’s Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 28 (1999) (referring to the “the last minute amendment offered by an opponent of the [Civil Rights Act] adding ‘sex’ to the list of protected classifications [in Title VII] in an apparently satirical attempt to make the legislation unacceptable to the majority of legislators”) (citing W. PEPPER & F. KENNEDY, *SEX DISCRIMINATION IN EMPLOYMENT* (1981)); Francis J. Vass, *Title VII: Legislative History*, 7 B.C. IND. & COMM. L. REV. 431, 441 (1966); accord *EQUALITY OF OPPORTUNITY*, *supra* note 13, at 10.

²⁵ See, e.g., *EQUALITY OF OPPORTUNITY*, *supra* note 13, at 10–11. The National Council on Disability’s summary of the enactment of the ADA notes that “[t]here would be no ADA were it not for the successful protests of African Americans, for their crowning achievement in the Civil Rights Act was also the philosophical foundation of the ADA.” *Id.* at 11. Indeed, the legislative history of the ADA is replete with analogies between discrimination on the basis of race and discrimination on the basis of disability, see, e.g., *Americans with Disabilities Act: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong. 22, 99, 189 (1989) [hereinafter *ADA: Hearings*], but similar analogies between discrimination on the basis of sex and discrimination on the basis of disability are not made. As stated by Senator Kennedy, “The ADA is carefully crafted to give disabled persons the same protections from discriminations that apply to racial minorities, no more, no less.” *Id.* at 189.

in the form of actual rights rather than policy preferences; (6) because the Civil Rights Act already established statutory protections prohibiting discrimination due to biases and stereotypes, it could be claimed that by simply expanding these existing protections to cover people with disabilities the ADA was not intended to be overly disruptive or intrusive; and (7) use of the civil rights model would not require significant federal spending—a politically significant point given the problem of budget deficits when enactment of the ADA was at issue.²⁶

Unfortunately, while at the time it made good sense to model the ADA on existing civil rights legislation prohibiting discrimination on the basis of race, for two primary reasons use of the civil rights framework may have ultimately served to hamper, rather than to promote, achievement of many of the Act's goals.²⁷

A. *Civil Rights and the Reasonable Accommodation Requirement*

The first reason that use of the civil rights model may have served to hamper rather than promote the ADA's goals lies in the apparent conflict between the traditional concept of civil rights and the reasonable accommodation requirement that is the core of the ADA's legislative scheme.

The ADA's proponents were—and are—careful to highlight not only the differences between the “civil rights” and “medical” approaches to dealing with the problem of disability, but the differences between the “civil rights” and “charitable” approaches. According to the Act's proponents, the ADA is not about giving charity to people with disabilities. The ADA's supporters continue to emphasize that people with disabilities do not want to be viewed as inferior or incapable citizens requiring patronization and pity. People with disabilities do not seek handouts or charity from others, nor do they seek to be awarded special favors or entitlements (indeed, the term “disabled” is used in the ADA rather than the previously used term “handicapped,” because the term “handicapped” was viewed as describing one who held his cap in hand, asking for charitable assistance). To the contrary, people with disabilities seek only to be treated in the same manner as people without disabilities are treated. They seek to be placed on

²⁶ Diller, *supra* note 6, at 35–37. The ADA exceeds the protections of section 504 in that it prohibits discrimination on the basis of disability by the private sector and does not attach any funding strings. *See id.* at 37.

²⁷ Although this article discusses only two reasons that use of the civil rights framework may have ultimately served to hamper achievement of the ADA's goals, there are additional reasons that the traditional civil rights model is inappropriate in the context of disability discrimination. Those reasons include, *inter alia*: (1) the diversity of the members of the minority class protected by the ADA; (2) the permeability and changeability of the members of that class; and (3) the individualized approach required to eliminate discrimination on the basis of disability. Time and space constraints preclude discussion of these matters in this article.

equal footing with people without disabilities—to be neither inferior to nor superior to nondisabled people. In short, they seek nondiscrimination. This is the basis of the traditional civil rights approach.

The problem with applying this traditional civil rights approach in the context of discrimination on the basis of disability is that in most cases treating people with disabilities in the same manner as people without disabilities serves to exclude people with disabilities from mainstream society, rather than to include them in mainstream society. As an individual who is deaf, I offer just a few obvious examples: If I am permitted to enroll in a regular school program alongside hearing peers but am not provided with “different” treatment to assist me in understanding what is said in the classroom, I am excluded from, rather than included in, the educational system. If I am given the same opportunities as my hearing peers to attend a movie, have a telephone and make and receive calls, attend a lecture or play, watch a television show, participate in or observe a court proceeding, but am not provided with “different” treatment to assist me in hearing what is said on the phone or television or at the play, movie or court proceeding, I am excluded from, rather than included in, those activities. Simple equal treatment does not result in my inclusion into mainstream society. To achieve that goal, I need to be treated differently from, not equally to, my hearing peers.

The ADA recognizes this need for different treatment, of course, and thus requires that “reasonable accommodations” be provided for qualified individuals with disabilities.²⁸ In this regard the Act appears contradictory. As a civil rights law the ADA purports to require *equal* treatment for people with disabilities. In recognition of the fact that equal treatment does not lead to inclusion in the mainstream for many people with disabilities, however, the ADA requires *different* treatment for people with disabilities. The ADA gives recognition to the incontrovertible fact that to provide individuals with disabilities with equal opportunities the civil rights model must be amended or expanded to incorporate the concept of accommodations. The ADA’s proponents did not, and do not, view the “equality” and “reasonable accommodation” precepts as being contradictory. To the converse, the reasonable accommodations to be provided for individuals with disabilities were, and are, considered to be an inherent part of the civil rights framework on which the ADA is based. Following that reasoning, the reasonable accommodations mandated by the ADA were not, and are not, viewed as constituting “affirmative action.”

Defining the concept of “affirmative action” is a complex issue, however.²⁹

²⁸ See 42 U.S.C. § 12112(b)(5) (1994); 28 C.F.R. § 35.130(b)(7) (1999) (explaining the “reasonable modification” requirement under Title II); 42 U.S.C. § 12182(b)(2)(A) (1994).

²⁹ As the Supreme Court noted in an early case interpreting section 504 of the Rehabilitation Act—the predecessor to the ADA (see 29 U.S.C. § 794 (1994))—it is not

Technically, a primary difference between affirmative action and reasonable accommodations is that the former looks to remedy past discrimination, while the latter looks to remedy immediate or prospective discrimination. While affirmative action gives preferential status to one group of people, reasonable accommodations do not give people with disabilities preferential status, but are provided to equalize the playing field for those requiring the accommodations. Looked at in this sense, the provision of reasonable accommodations differs from *traditional* affirmative action principles. That is not to say, however, that the provision of reasonable accommodations does not constitute *some* form of affirmative action. If we require a provider of telecommunication services to pay for and provide me with additional equipment or services—not provided to people who can hear—to enable me to understand what is said on the telephone, we are requiring that entity to take affirmative steps for my benefit. If we require an employer to pay for and provide me with an interpreter so I can perform a job, a theater to pay for and provide me with an interpreter so I can watch a play, and a hotel to pay for and provide me with special equipment so I can make telephone calls, then we are requiring those entities to take affirmative steps for my benefit. We are requiring these entities to spend money and/or reorganize their policies to treat me differently—that is, to take affirmative action on my behalf (which action is labeled as “reasonable accommodations” under the ADA). This is not the same type of affirmative action as, for example, requiring an employer to give affirmative preference to me, or any other person with a disability, in the hiring or promotion process,³⁰ but, while it may differ in shape,

always easy to define the line between the illegal refusal to make reasonable accommodations for qualified people with disabilities and the legal refusal to provide affirmative action for such individuals. *See* Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 412 (1979). *See also* Alexander v. Choate, 469 U.S. 287, 299–302 (1985).

³⁰ Thus, the “affirmative action” provided me does not have a “reverse discrimination” effect on nondisabled people in the same manner that affirmative action on the basis of race is contended to have a reverse discrimination effect on individuals of the majority race.

The only situation in which the ADA arguably places an individual with a disability in a preferred position is that involving the suggested reasonable accommodation of reassigning a current employee who becomes unable to perform his or her current position due to a disability to a vacant position for which that employee is qualified. *See* 42 U.S.C. § 12111(9) (1994). In that situation the employee with a disability may be given preferential status over another applicant for the vacant position at issue. *See, e.g.,* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1170 (10th Cir. 1999) (ruling that under ADA Title I an employee with a disability is entitled to be reassigned to a vacant position as a reasonable accommodation even if another applicant is better qualified for that vacant position). Many courts, however, have not accepted this principle, but, to the contrary, have very narrowly defined the reasonable accommodation concept in the area of reassignment. *See, e.g.,* Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995); Fussell v. Ga. Ports Auth., 906 F. Supp. 1561, 1569–71 (S.D. Ga. 1995). The courts are divided on this issue.

it is nevertheless one form of affirmative action.³¹

The desire to characterize reasonable accommodations and affirmative action as completely separate concepts³² is understandable. Defining the provision of reasonable accommodations as a form of affirmative action is troubling because that definition reinforces the incorrect assumption that by being provided with such accommodations I am somehow being placed in a superior position to others.³³ In actuality, however, the reasonable accommodations provided for my deafness, while permitting me to participate in mainstream society in instances in which I would not be able to participate absent those accommodations, usually do not even serve to place me in a position that is equal to the position held by my hearing peers.

By way of example, while my employer may provide me with a TDD so that I may use the telephone, and while I may use a relay service provided pursuant to the ADA to enable me to talk on the telephone with people who do not have TDDs, use of the telephone via TDD and a relay service does not, by any stretch of the imagination, equal use of the "regular" telephone system. Utilizing a relay service is a very artificial means of using the phone, since an intermediary does the actual talking or typing for the recipient, and thus the individual speaking is not able to provide her own emphasis or mannerisms and easy "give and take" of conversational flow is prohibited. One cannot interrupt during a relay call since one must wait for a message from the relay operator saying "go ahead" (GA) before responding. Further, relay calls take at least three times as long as voice

³¹ Other commentators have previously reached this conclusion. *See, e.g.*, Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination and Reasonable Accommodation*, 46 DUKE L.J. 1, 14 (1996) (noting that the provision of reasonable accommodations constitutes "affirmative action, in the sense that it requires an employer to take account of an individual's disabilities and to provide special treatment to him for that reason").

³² *See, e.g.*, Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 147-50 (1998) (stating that affirmative action and the provision of reasonable accommodations "differ in degree and character").

³³ The first time I requested an accommodation due to my deafness was when I asked to be provided with the assistance of student notetakers for my law school classes. I was not able to understand *anything* that was said during my law school classes, in part because of the Socratic method of teaching. The students taking notes for me provided me with four to five pages of handwritten notes. (I had tried taping the classes and having a secretary transcribe the tapes, but each class required the secretary to type between 30 and 40 pages, which would take hours—sometimes days due to the difficulty of replaying the tape to hear what was said—and proved to be much too expensive. Unfortunately, I went to law school before the concept of real time transcription was developed.) Despite the fact that I was only provided with a very brief summary of the subject matter discussed in classes, and thus I still missed most of what was said in the classroom, at least a few of my fellow law students were convinced that I was receiving a special advantage. Tucker, *supra* note 2, at 123-53.

calls, privacy is prohibited, relay operators frequently miss part of the message they are supposed to relay, and relay operators are unable to type fast enough to make calls for a deaf caller using the new voice mail systems where a menu is typed requesting the caller to push a button to reach the appropriate department (it often takes four phone calls just to have the menu relayed to the deaf caller!).

Similarly, while I may be provided with an interpreter to permit me to understand what is said at a meeting or function, communicating via an interpreter does not, by any stretch of the imagination, equal the ability to communicate without an interpreter. Instead of looking at the speaker, I am forced to watch the interpreter, thus losing valuable eye contact with the person who is speaking. Interpreters sometimes miss what the speaker says, or I might miss something the interpreter tries to interpret due to the difficulty of intently concentrating for long periods of time. Even a slight lag time between the time the speaker speaks and the time the interpreter relays the message may prevent me from asking a question or making a comment at an appropriate time. Most importantly, however, the interpreter can only interpret what the main speaker is saying; it is not possible for her to interpret side comments or comments made by various people—often by several people speaking at once—during a presentation. Thus, I miss the infrequent jokes or asides that are very important if one is to become a real part of the group. Finally, the interpreter's presence is off-putting to others. Because I am sitting with the interpreter and watching the interpreter other individuals often feel that they are precluded from speaking with me. Using an interpreter on the telephone presents even greater problems. I am never free to make a phone call at whim when and where I wish to. I must always find the interpreter, assuming she is at the office at her desk (and is not on break or in the restroom or has not left for the day), and go through the time-consuming process of getting ready to make an interpreted call. The lack of privacy is extremely frustrating—even if the call is not confidential it is not pleasant to have someone sitting across from you listening to every word you say or that others say to you, and sometimes inadvertently expressing silent disapproval.

While these types of accommodations make it possible for me to integrate in some aspects of mainstream society they do not serve to "equalize" the playing field between me and people who can hear. Certainly they do not place me in a position of superiority to my hearing peers.³⁴ Consequently, the reasonable accommodations provided to me are liberating albeit somewhat limiting. Nonetheless, the question that remains to be answered with respect to those accommodations is: How is asking entities to pay for and provide services or equipment for me that is not paid for and provided to others distinguishable from asking these entities to provide me with a form of special entitlements or special

³⁴ It is unfortunate that nondisabled people sometimes do not recognize this reality. *See, e.g., supra* note 33.

favors? I do not think it is distinguishable. I think that is exactly what I am doing. And I think that the entities covered by the ADA think that is what I am doing, and the courts think that is what I am doing.³⁵

It is true, of course, that society-at-large will benefit from the integration of people with disabilities into mainstream society, particularly into the workforce.³⁶ An employer benefits from the services of a wide variety of employees, and society benefits from the taxes of employed people with disabilities and the fact that working individuals with disabilities need not be supported by the taxpayers via government assistance. Society-at-large benefits from the integration of people with disabilities into all aspects of mainstream society. Two examples serve to illustrate this point: When an interpreter is provided to enable a student who is deaf to communicate in the classroom, hearing members of the class also benefit from the deaf student's participation.³⁷ When an individual who is deaf is provided with a TDD and use of a relay service, not only does the deaf person benefit by being able to use the phone but

³⁵ Some commentators argue very persuasively that this concept of "special assistance" is fictional, and that the cost of equipment to enable a person with a disability to participate in a program or job is no different than the cost of other equipment to be utilized by everyone. Professor Adrienne Asch, for example, wrote this author:

Why do I have more "right" to the content of a play because I can hear it with my own ears than you do if an interpreter or real-time captioning exist in the world? Why should not the cost of plays for the general public include some built-in cost for the occasional interpreter, as they include the cost for heat, light [and] luxurious seating material? If you answer that [the latter] things benefit everyone, and the interpreter benefits only the occasional deaf person, you will be accurate; but why do you, as a human being alive in the world with money to spend and intellect to use, deserve any less chance at what technology and institutional arrangements can create? . . . Are you less of a human being and a member of the moral, human, social community because you have a disability? . . . [W]hy should we force people to live always observing what they cannot have, even though the means are available for them to have it?

Letter from Adrienne Asch to Bonnie Poitras Tucker [hereinafter Asch Letter] (on file with the author). While I agree in theory with the sentiments and concepts expressed by Professor Asch, society-at-large and the courts are not yet willing (and may never be willing) to accept the practical realities involved in implementing those concepts. For further discussion of this issue, see *infra* note 103.

³⁶ See, e.g., PETER DAVID BLANCK, *THE AMERICANS WITH DISABILITIES ACT AND THE EMERGING WORKFORCE: EMPLOYMENT OF PEOPLE WITH MENTAL RETARDATION* § 13.3 (1998) (discussing some workplace benefits resulting from the provision of reasonable accommodations for employees with disabilities). The ADA itself notes that unnecessary discrimination and segregation of people with disabilities "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. § 12101(a)(9) (1994).

³⁷ See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990).

hearing people who want or need to communicate with that deaf person also benefit by being able to talk to the deaf person on the phone.

However, these benefits to society-at-large are merely tangential. They are not the major focus of the ADA, nor should they be. The hearing students will suffer little detriment if a small number of deaf students are not able to participate in class discussions—those hearing students are still able to benefit from the contributions of the overwhelming majority of their classmates. Similarly, hearing people will suffer little detriment if the few deaf people they want or need to communicate with must communicate via mail, fax, computer, or on a person-to-person basis rather than via the telephone—those hearing people are still able to use the telephone with the overwhelming majority of the population.

Indeed, even the public benefits reaped by the ADA's mandate against employment discrimination on the basis of disability may be relatively minimal. Many people with very severe disabilities are unable to work because there are no reasonable accommodations that will enable such individuals to enter the workforce. The fact that the ADA has not led to an increase in the number of people with disabilities in the workforce³⁸ may be due to the relatively small number of people with disabilities who are able to benefit from ADA Title I. The public benefits from taxes paid by disabled employees and a reduced number of people with disabilities who are supported by state or federal governments may thus be fewer than originally hoped or expected.³⁹ But debating this issue at this juncture is somewhat futile, for the extent to which society-at-large will benefit from the inclusion of people with disabilities in mainstream society is not the crux of the matter. Rather, the crux of the matter is contained in the following two elementary precepts.

First, it cannot be fairly disputed that the primary beneficiaries of the ADA are people with disabilities. I am the primary beneficiary of the affirmative steps I am asking entities covered by the ADA to take on my behalf. I am the primary

³⁸ A 1998 study, for example, found that the proportion of working-age adults with disabilities who are employed has declined, rather than increased, since 1986. 1998 NATIONAL ORGANIZATION ON DISABILITY/LOUIS HARRIS & ASSOC. SURVEY OF AMERICANS WITH DISABILITIES, EXECUTIVE SUMMARY, at <http://www.nod.org/presssurvey.html> (July 23, 1998). See also Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMP. & LAB. L. 271 (2000) (noting that there has been an overall decline in labor force participation for men with disabilities since 1990). But see Paul Steven Miller, *The EEOC's Enforcement of the Americans with Disabilities Act in the Sixth Circuit*, 48 CASE W. RES. L. REV. 217, 219-21 (1998) (stating, to the converse, that since passage of the ADA more people with disabilities have entered the workforce).

³⁹ This discussion is outside the scope of this article. The point I am making here is that benefits to society-at-large resulting from the anti-discrimination mandates of the ADA are tangential benefits, and not the primary purpose for enactment of the ADA.

beneficiary of the interpreter needed to allow me to see the play, the additional equipment and services necessary to allow me to use the telephone, and any accommodations my employer must provide to enable me to perform my job. Second, and perhaps more important, the ADA *intends* for those affirmative steps to primarily benefit me and other people with disabilities. The Act's repeatedly stated purpose is to alleviate the difficulties people with disabilities face in attempting to integrate into mainstream society.⁴⁰ Any tangential benefits that result to society-at-large are simply an added bonus.

When enacting the ADA, Congress determined that to provide individuals with disabilities with civil rights and equality of opportunity, entities covered by the Act must be required to provide such individuals with some form of special treatment—analagous to “special favors” or “entitlements.” Congress determined that the provision of reasonable accommodations is necessary to foster the goal of enabling people with disabilities to integrate into mainstream society. And the ADA provides that this special treatment must be paid for and provided by certain segments of our society, including employers,⁴¹ owners and operators of places of public accommodations,⁴² providers of telecommunications services,⁴³

⁴⁰ The “findings” section of the ADA outlines the various forms of discrimination faced by people with disabilities, 42 U.S.C. § 12101 (a)(2), (3), (5), (7) (1994), and states that, “unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.” § 12101(a)(4). The same section provides that “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous . . .” § 12101(a)(9). Accordingly, the Act provides that its stated purposes are to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and “to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.” § 12101(b)(1), (4). Timothy Cook, who was heavily involved in promoting passage of the ADA, wrote eloquently of the benefits that would result from the ADA’s mandate to fully integrate people with disabilities into mainstream society. Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 448–56 (1991). All of the benefits discussed are benefits to people with disabilities themselves.

The ADA’s proponents, however, discussed the Act’s potential benefits to the public-at-large as a means of drawing support for the Act’s enactment. *See, e.g.*, 136 CONG. REC. S9530 (daily ed. July 11, 1990) (Senator Durenberger, in support of the Act’s passage, contending that enactment of the ADA was critical to the country’s economic future). The ADA’s finding that the dependency and nonproductivity of people with disabilities resulting from discrimination is costly, *see supra* note 35, results from such testimony.

⁴¹ §§ 12111–12117.

⁴² §§ 12181–12189.

⁴³ Title IV of the ADA amends the Communications Act of 1934. *See* 47 U.S.C.

and state and local government entities.⁴⁴ With the exception of the costs to be borne by state and local government entities (and in that context by society as a whole), Congress has determined that these specified segments of our society are to bear the cost, as part of their overall business expenses, of the special treatment necessary to allow individuals with disabilities to take part in mainstream society.⁴⁵

The underlying principle of the ADA is that people with disabilities must be fully integrated into society—that we must recognize the potential of *all* members of society, disabled or not, even though it may cost money or impose some burdens upon covered entities to reach this objective. Thus, for example, Senator Paul Simon stated during congressional hearings on the ADA that Congress was finally going to do the “right and decent thing” by enacting the ADA despite the costs that would be incurred as a result.⁴⁶ Senator Bob Dole, acknowledging that the ADA would place “some burdens” on the business sector, stated that such burdens were justified because the ADA would “make it much easier” for Americans with disabilities.⁴⁷ And upon signing the Act, President Bush stated that the administration was “committed to containing the costs that may be incurred [as a result of the ADA’s enactment].”⁴⁸ Congress and the Executive branch clearly recognized the costs and burdens to be incurred as a result of the ADA’s enactment. Thus, for example, the National Council on Disability’s comprehensive report on the enactment of the ADA notes that “[t]he most controversial issue in the redrafting stage [of the ADA] was the cost and burden imposed upon covered entities.”⁴⁹ Nonetheless, Congress and the

§ 225(a)(3) and (b) (1994).

⁴⁴ 42 U.S.C. §§ 12131–12150 (1994). Of course, benefits provided by state and local government entities are paid for by the taxpayers—in other words, by society in general.

⁴⁵ Some commentators are of the opinion that these expenses should be borne by society as a whole in the form of a general tax, rather than by specific segments of our society. *See, e.g.,* RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 480–94 (1992); Carolyn Weaver, *Incentives Versus Controls in Federal Disability Policy*, in *DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES* 3, 3–17 (Carolyn Weaver ed., 1991). And, as noted previously, the expenses mandated by ADA Title II, which requires state and local government entities to pay for and provide reasonable accommodations to permit integration of people with disabilities into their programs and activities, are borne by the taxpayers, and thus the public-at-large.

⁴⁶ *ADA: Hearings*, *supra* note 25, at 22.

⁴⁷ *Knocking Down a Barrier*, *NEWSDAY* (Nassau and Suffolk Edition News), July 27, 1990, at 7.

⁴⁸ John W. Mashek, *To Cheers, Bush Signs Rights Law for Disabled*, *BOSTON GLOBE*, July 27, 1990, at 4.

⁴⁹ *EQUALITY OF OPPORTUNITY*, *supra* note 13, at 100.

Executive branch concluded that those costs and burdens must be imposed in a manner that provides equal opportunity to all individuals with disabilities.⁵⁰

Unfortunately, the ADA does not directly address the seeming conflict between traditional civil rights principles of equality and the provision of different treatment to accommodate individuals with disabilities. The legislative history of the Act, the Act itself, and the Act's implementing regulations, speak of equal rights, of civil rights, and of eliminating discrimination against people with disabilities⁵¹ in a fashion analogous to the manner in which discrimination on the basis of race is eliminated. The Act imposes a "reasonable accommodation" requirement on covered entities, but does not state forthrightly, in its preamble or elsewhere, that the provision of such accommodations constitutes a necessary form of special entitlements, or an expansion of traditional civil rights principles. Instead, the Act speaks solely about "nondiscrimination," and the drafters and supporters of the Act contend that the reasonable accommodations that must be provided to achieve such nondiscrimination do *not* constitute a form of special entitlements.

Use of the nondiscrimination terminology, and the tactical decision that the ADA would not speak of accommodations in terms of special entitlements or special treatment, was obviously necessary from a political perspective. To make the ADA palatable to the business sector, the states, and ultimately our representatives in Congress who are responsive to the concerns of their constituents, the ADA had to be framed in such a manner that it did not seem overly disruptive or intrusive. It is highly unlikely that Congress could have been persuaded to enact a law that outspokenly required the business sector and state and local governments to provide special entitlements to people with disabilities. The ultimate objective of the ADA, however, is just that. That the ADA labels the requisite special treatment as traditional nondiscrimination does not change the fact that *more* than traditional nondiscrimination is being required of entities covered under the ADA.

⁵⁰ Thus, for example, Congress refused to amend Title I of the ADA to impose a proposed ten percent salary cap on the extent of accommodations a covered employer must provide an employee, because such a cap would discriminate against individuals with low paying jobs. *See id.* at 159.

⁵¹ Thus, the purposes of the ADA are stated as being :

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; . . . and (4) to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b) (1994).

While the goal of equality is the same under the Civil Rights Act of 1964 and the ADA, the means by which equality is to be achieved under the two Acts are very different. Many courts are troubled by this contradiction between the traditional civil rights label given the ADA and the affirmative action obligation imposed by the Act which vastly exceeds the traditional nondiscrimination mandate of the civil rights laws the ADA purports to emulate.

Numerous decisions weakening the ADA or finding ways to deny enforcement of the ADA appear to reflect the courts' discomfort with these seemingly contradictory statutory objectives. The courts either do not understand, or do not accept, the concept of reasonable accommodations as a necessary component of the civil rights premise underlying the ADA. Rather, the courts view the reasonable accommodation requirement as an *additional* step that must be taken by covered entities, which goes above and beyond the provision of traditional civil rights. In particular, judicial decisions severely limiting the scope of the ADA, such as those in which the courts have drastically narrowed the definition of a person with a disability warranting the protections of the Act,⁵² are probably the result of the courts' reluctance to impose what they view as widespread affirmative action responsibilities on specific entities under the guise of a traditional civil-rights/nondiscrimination mandate. Other examples of judicial decisions that are likely the result of this reluctance include cases in which the courts have significantly limited the circumstances under which the ADA is held to apply. I will cite just a few examples by way of illustration.

⁵² Such cases include the recent Supreme Court decisions of *Sutton v. United Airlines Inc.*, 527 U.S. 471, 482 (1999) (holding that a determination of whether an individual has a disability within the meaning of the ADA must be made in light of mitigating factors that may ameliorate the effects of the disability), *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 521–22 (1999) (holding that an individual is “regarded as” being substantially limited in the ability to work, and thus disabled, only if that individual is regarded as unable to perform a class of jobs using his or her skills in the geographical location to which he has access), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999) (holding that the determination of whether an individual is disabled under the ADA must be made in light of the individual's physical or mental ability to compensate for a physical impairment). These three decisions have very drastically limited the number of people considered disabled and, thus, deserving of the protections of the ADA. This author discussed the ramifications of these cases in a paper presented at a symposium at the University of Alabama Law School in March, 2000, which will be published in the University of Alabama Law Review. See Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000). Accordingly, these cases will not be discussed in this article.

1. *Cases in Which the Courts Have Narrowed the Circumstances under Which ADA Title II Applies*⁵³

ADA Title II provides, *inter alia*, that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”⁵⁴ Title II was enacted to ensure that people with disabilities are provided with the “different” treatment necessary to ensure that they are treated in an equivalent manner to people without disabilities with respect to the services and programs of state and local government entities. Equivalency is the key. Since equal treatment of people with disabilities often leads to unequal results, different treatment is required to ensure equivalent results.⁵⁵ Many courts, however, obviously troubled by this concept of

⁵³ One burgeoning issue in this regard involves the question of whether Congress validly exercised its powers under the Fourteenth Amendment when it waived states’ Eleventh Amendment immunity under the ADA. The courts have been divided on this issue. A few courts have held that Congress’s waiver of states’ Eleventh Amendment sovereign immunity in the ADA did not constitute a valid exercise of congressional authority under the Fourteenth Amendment, and thus states are immune from suits for damages under the ADA. *See, e.g.,* *Erickson v. Bd. of Governors of State Colls. & Univs. for Northeastern Ill. Univ.*, 207 F.3d 945 (7th Cir. 2000); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999). Still other courts have held, to the contrary, that ADA Title II constituted a valid exercise of Congress’s power under the Fourteenth Amendment and thus states are not immune from suits for damages under Title II. *See, e.g.,* *Garrett v. Univ. of Ala. Bd. of Trs.*, 193 F.3d 1214 (11th Cir. 1999); *Dare v. State of Cal. Dep’t of Motor Vehicles*, 191 F.3d 1167 (9th Cir. 1999); *Martin v. Kansas*, 190 F.3d 1120 (10th Cir. 1999); *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999); *Fla. Dep’t of Corrections v. Dickson*, 157 F.3d 908 (11th Cir. 1998); *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997). It was hoped that the Supreme Court would clarify the split among the circuits this year. The Court granted certiorari in both the *Dickson* and *Alsbrook* cases, but the cases both settled before the Court could hear or decide the matter. Subsequently a writ of certiorari was granted in part in *Garrett*, and it is expected that the Court will decide this issue next term. *Univ. of Ala. Bd. of Trs. v. Garrett*, 120 S. Ct. 1669 (2000). (As this article went to press, the Supreme Court decided *Garrett*. 2001 U.S. LEXIS 1700 (Feb. 21, 2001)).

In holding that Congress did not have authority under the Fourteenth Amendment to waive states’ sovereign immunity to suits under the ADA, the Seventh Circuit in *Erickson* relied heavily on the fact that “[t]he ADA goes beyond the anti-discrimination principle . . .” *Erickson*, 207 F.3d at 951. The court explained clearly that the ADA is not merely an antidiscrimination statute, but goes beyond that purpose in requiring that covered entities take affirmative steps to accommodate persons with disabilities. *Id.* It can only be hoped that the Supreme Court will not follow similar reasoning when the Court finally renders a decision on this question.

⁵⁴ 42 U.S.C. § 12132 (1994).

⁵⁵ *See generally*, 28 C.F.R. §§ 35.104–35.178 (1999) (the DOJ’s regulations enacted

different treatment to ensure equivalent results, have found numerous ways to narrow the scope of ADA Title II. One vivid example is found in judicial decisions holding that ADA Title II does not apply to the conduct of police in making arrests.⁵⁶

Suppose that state police arrest an individual who is deaf and communicates only via American Sign Language (ASL).⁵⁷ Because the deaf individual is unable to understand or communicate with the police officer, he may have no idea what is happening to him. As a result, the deaf individual may suffer severe anxiety, will be unable to explain events or circumstances explaining why the arrest may be inappropriate, and his failure to speak or incomprehensible efforts to sign may be viewed as constituting hostile or uncooperative behavior. The following two real life situations serve to illustrate this point.⁵⁸

A deaf driver was pulled over by the police for committing a minor traffic violation. As the police approached the stopped vehicle they observed beer cans in the back of the car and thought they had probable cause to believe the driver might be intoxicated. While still standing behind the car the policemen ordered the driver to exit his vehicle with his arms over his head. Being unable to hear the policemen, the driver did not exit the car. The policemen, therefore, pulled the driver out of the car and twisted his arms behind his back, dislocating his

pursuant to Title II); U.S. DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL (1993) [hereinafter DOJ, MANUAL].

⁵⁶ See, e.g., *Rosen v. Montgomery County*, 121 F.3d 154, 157 (4th Cir. 1997) (noting that to hold that arrest procedures fell within the ambit of ADA Title II would constitute "a stretch of the statutory language and of the underlying legislative intent"); *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1160 (W.D. Wash. 1999) (stating that "an arrest is not the type of service, program or activity from which a disabled person could be excluded or denied the benefits, although an ADA claim may exist where the claimant asserts that he has been arrested because of his disability (*i.e.*, he has been subjected to discrimination)").

⁵⁷ American Sign Language (ASL) is a completely different language from English that has its own grammar and syntax and is based on the use of signs representing a limited number of primarily concrete terms. See, e.g., J.K. Kresse & P. Kleven, *Deaf People and Sign Language Interpreters in Court: A Booklet for Bench and Bar* 4, 11 (1981) (explaining that ASL is a "complete language which is separate and not dependent upon English for its meaning and bears no structural resemblance to English," and noting, for example, that ASL qualifiers generally follow rather than precede the noun as in English, events are normally placed in chronological order, cause and effect relationships are generally stated in the form of rhetorical questions, and conditional phrases are usually placed last in a sentence). The differences between English and ASL may be illustrated by two examples: A person signing or writing in ASL might state "your true most need tell me must," while an English speaking person would state "you must tell me what you really need most"; a person signing or writing in ASL might ask "touch San Francisco already you?" while an English speaking person would ask "have you been to San Francisco?"

⁵⁸ These examples are taken from Bonnie Poitras Tucker, *Deaf Prison Inmates: Time to Be Heard*, 22 LOY. OF L.A. L. REV., 1, 3-4 (1988).

shoulders. After explaining to the policemen via gestures that he was deaf, the driver was taken to the police department for a breath test. He was handed the breathalyzer equipment and told to "blow." Unfortunately he did not blow hard enough and thus he was orally instructed to blow "harder." The deaf man did not comprehend the abstract term "harder,"⁵⁹ and thus failed to follow instructions. Accordingly, the police reported that the deaf driver "refused to take a breath test," and, pursuant to applicable law, his license was revoked for six months.⁶⁰

Late one evening two men were observed by a policeman to be fighting in the street. The policeman broke up the fight and attempted to question the two men. Because one of the men was deaf and communicated solely via ASL, the policeman was unable to communicate with that man. Based upon the hearing man's version of the fight, however, the policeman arrested the deaf man for assault and placed him in the local jail.⁶¹

In both of these situations, once the police officers became aware the individuals were deaf, the deaf individuals needed to be provided with the "different" services of qualified ASL interpreters to ensure that the treatment they received by the police was "equivalent" to the treatment hearing people received by the police. This is precisely one form of affirmative conduct required by Title II to accomplish the goal of nondiscrimination.⁶² The only explanation for judicial decisions holding to the contrary lies in the reluctance of those courts

⁵⁹ The term "hard" represents something concrete, such as a rock. To the converse, the term "harder," as in "blow harder," represents an abstract concept. Such abstract concepts are often unfathomable to deaf persons who communicate in ASL, which is based on a limited number of signs representative of a relatively small number of concrete words.

⁶⁰ Reported by Helen Young, nationally certified interpreter for the deaf, Phoenix, Arizona.

⁶¹ *Id.* After spending the night in jail the deaf man attended a preliminary hearing before the local magistrate, accompanied by a qualified ASL interpreter. After listening to the deaf man's side of the story the magistrate dismissed the charges against him.

A similar problem sometimes occurs when two drivers, one hearing and one deaf and a user of ASL, are involved in a car accident. Often the police ticket the deaf driver based on the one-sided "facts" provided by the hearing driver, who is the only person the police officer is able to communicate with. *Id.*

⁶² Other courts, therefore, have recognized that the conduct of police in making arrests clearly falls within the ambits of ADA Title II. *See, e.g.,* Gorman v. Bartch, 152 F.3d 907, 913 (8th Cir. 1998) (holding that an arrestee with paraplegia stated a claim under ADA Title II relating to the manner in which he was transported from the site of arrest to the police station); *People v. Long*, 693 N.E.2d 1260, 1262-63 (Ill. App. Ct. 1998) (holding that Title II applied to plaintiff's claim relating to arrest by police but finding that Title II was not violated); *Barber v. Guay*, 910 F. Supp. 790, 802 (D. Me. 1995) (finding that Title II applies to claims of individuals with disabilities relating to arrest by police); *Jackson v. Inhabitants of Sanford*, 3 Am. Disabilities Cas. 1366, 1371 (D. Me. 1994) (holding that defendants' claim that ADA Title II did not apply to arrest situations was "plainly wrong").

to recognize that ADA Title II imposes affirmative requirements on state and local government entities that go beyond the simple civil-rights/equal-treatment premise of the Act. To hold, as did the court in *Patrice v. Murphy*,⁶³ that ADA Title II only applies in an arrest situation when the claimant alleges that he has been arrested because he is disabled, defeats the purpose of that Title. No police officer is likely to arrest an individual because he is deaf, or because he has some other disability. Rather, the more likely form of discriminatory police conduct in the context of an arrest is the police officer's failure or refusal to affirmatively provide accommodations for a disabled arrestee or potential arrestee to ensure equivalent treatment of that individual.⁶⁴ Some courts, however, are not willing to require state entities to engage in such affirmative conduct.

2. Cases in Which the Courts Have Narrowed the Scope of ADA Title I

Courts have been especially ingenious in devising means of limiting the scope of ADA Title I's prohibition of employment discrimination on the basis of disability. Again, I will cite just one example—that being judicial decisions dealing with the issue of necessary reasonable accommodations that might conflict with applicable collective bargaining agreements.

ADA Title I prohibits employers, employment agencies, labor organizations, or joint-labor management committees from discriminating on the basis of disability.⁶⁵ To prevent such discrimination, all entities governed by Title I must provide reasonable accommodations for qualified employees or applicants with disabilities.⁶⁶ Title I, and the EEOC's regulations promulgated thereunder,

⁶³ 43 F. Supp. 2d 1156, 1160 (W.D. Wash. 1999).

⁶⁴ An analogous situation is found in the judicial decisions initially holding that ADA Title II does not govern the activities of state and local correctional (prison) facilities. *See, e.g.,* *Amos v. Md. Dep't of Pub. Safety & Corr. Servs.*, 126 F.3d 589 (4th Cir. 1997); *White v. Colorado*, 82 F.3d 264 (10th Cir. 1996); *Pierce v. Assistant Superintendant King*, 918 F. Supp. 932 (E.D.N.C. 1996); *Little v. Lycoming County*, 912 F. Supp. 809 (M.D. Pa. 1996); *Staples v. Va. Dep't of Corr.*, 904 F. Supp. 487 (E.D. Va. 1995). Fortunately, that reasoning was overturned by the Supreme Court's ruling in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998). Note, however, that on remand the lower court found that the plaintiff prisoner, Yeskey, was not disabled under the ADA and thus could not invoke the Act's protections. *Yeskey v. Commonwealth*, 76 F. Supp. 2d 572, 577–78 (M.D. Pa., 1999).

⁶⁵ 42 U.S.C. § 12111(2) (1994).

⁶⁶ § 12112(b)(5) (1994). The term "reasonable accommodations" is described in the EEOC's Title I regulations as: (1) "[m]odifications or adjustments to a job application process . . . to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed," or (2) a modification or adjustment that allows a disabled employee to enjoy the same benefits and privileges enjoyed by non-disabled employees, as long as such modification or adjustment does not impose an undue hardship on the employer's business. 29 C.F.R. § 1630.2(o)(1) (1999).

suggest several "reasonable accommodations" that covered entities may provide for employees with disabilities.⁶⁷ The crucial issue is whether a proposed accommodation to permit an employee with a disability to perform a job is "reasonable." Suppose the proposed accommodation conflicts with the terms of an otherwise applicable collective bargaining agreement. Is that accommodation "reasonable," or does it constitute an "undue hardship" on the covered entity's business, which renders the accommodation unreasonable?⁶⁸

When enacting the ADA, Congress intended that a collective bargaining agreement should not necessarily serve as a defense to an employer who fails to accommodate an employee with a disability as required by ADA Title I. The legislative history of the ADA notes that "if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to that job. *However, the agreement would not be determinative on the issue.*"⁶⁹ That report further notes that "if the collective bargaining agreement lists job duties, such a list may be taken into account in determining whether a given task is an essential function of the job. *Again, however, the agreement would not be determinative on the issue.*"⁷⁰

In accord with this legislative intent, the EEOC recognizes that the terms of a collective bargaining agreement may be relevant in determining whether a proposed accommodation is reasonable, but that the terms of the collective bargaining agreement would not be dispositive of the issue.⁷¹ Further, because both labor unions and employers are subject to the nondiscrimination/reasonable accommodation mandate of Title I, the Senate Labor Committee Report on the

⁶⁷ 42 U.S.C. § 12111(9)(A) and (B) (1994); 29 C.F.R. § 1630.2(o)(2) (1999). The suggested accommodations include, but are not limited to: (1) "[m]aking existing facilities readily accessible to and usable by individuals with disabilities;" (2) job restructuring (by reallocating or redistributing non-essential job functions); (3) development of part-time or modified work schedules; (4) reassignment to a vacant position when accommodation within an employee's current job cannot satisfactorily be made; (5) acquisition or modification of equipment or devices; (6) modification or adjustment of examinations, training materials or policies; and (7) the provision of qualified readers or interpreters for employees who are blind or deaf. *Id.*

⁶⁸ An accommodation is not reasonable if it constitutes an "undue hardship" on the employer's business. 42 U.S.C. § 12111(10) (1994).

⁶⁹ H.R. REP. NO. 101-485, at 63 (1990), (emphasis added); *reprinted in* 1990 U.S.C.C.A.N. 303.

⁷⁰ *Id.* (emphasis added).

⁷¹ See, e.g., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM., A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT §§ I-3.9(5), I-7.11(a) (1992) [hereinafter EEOC TECHNICAL ASSISTANCE MANUAL].

ADA suggested that, to avoid conflicts between provisions of a collective bargaining agreement and an employer's obligations to provide reasonable accommodations for employees with disabilities, collective bargaining agreements negotiated after the July 1992 effective date of ADA Title I should "contain a provision permitting the employer to take all actions necessary to comply with" the ADA.⁷²

Despite the mandate that both labor unions and employers comply with ADA Title I, and despite the clear statements of legislative intent that proposed accommodations that conflict with applicable collective bargaining agreements are *not* to be considered per se unreasonable, the courts have repeatedly held that an accommodation is automatically unreasonable if it would violate the rights of other employees under an applicable collective bargaining agreement.⁷³ The courts seem to disregard altogether the need for unions to comply with the ADA, but, instead, hold collective bargaining agreements sacrosanct—and safely removed from the long arms of the ADA. In short, the courts are not willing to recognize (much less enforce) Title I's requirement that employers and labor unions take affirmative steps—including modifying relevant collective bargaining agreements—to eliminate the unequal status of people with disabilities in the workplace.⁷⁴

An employer might, of course, justify its refusal to unilaterally disregard a collective bargaining agreement to provide an accommodation for a disabled employee on the ground that such action would be held to violate the National Labor Relations Act (NLRA).⁷⁵ That does not excuse the joint obligation of employers and labor organizations to agree on appropriate reasonable accommodations for employees with disabilities, however. Moreover, why is it automatically assumed that the NLRA should take priority over the ADA? A court could just as easily hold that an employer who refused to provide an

⁷² S. REP. NO. 101-116, at 32 (1989). *See also* EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 71, at § I-7.11(a) (discussing that report).

⁷³ *See, e.g.*, *Kralik v. Durbin*, 130 F.3d 76 (3rd Cir. 1997); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1051–52 (7th Cir. 1996); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114 (8th Cir. 1995); *Wooten v. Farmland Foods*, 58 F.3d 382 (8th Cir. 1995); *Doe v. Town of Seymour*, No. 3:95 CV1538, 1998 U.S. District LEXIS 676 (D. Conn. Jan. 15, 1998).

⁷⁴ Indeed, in some cases courts have simply noted that the union has not waived the provision at issue in the applicable collective bargaining agreement, without even mentioning the union's obligation to make reasonable accommodations under ADA Title I. *See, e.g.*, *Kralik*, 130 F.3d at 81. I suspect that many courts may erroneously view such an accommodation as placing an employee with a disability in a "superior" position to other employees, by virtue of the fact that the employee with a disability would not have to comply with the same rules under the collective bargaining agreement.

⁷⁵ National Labor Relations Act, 29 U.S.C. §§ 151–187 (1994).

accommodation for a disabled employee has violated the ADA as the court could hold that the unilateral provision of such an accommodation violated the NLRA. The majority of courts, however, automatically give preference to the NLRA over the ADA, perhaps because costs or burdens may be incurred, or "special treatment" may be provided, when an employer complies with the ADA but not when the employer complies with the NLRA, or perhaps simply because the court is not enamored of the ADA's precepts. This is another example of a situation in which the courts are not willing to look beyond the stated civil-rights/equal-treatment premises of the ADA.

3. *Cases in Which Courts Have Narrowed the Scope of ADA Title III*

Courts have also been ingenious in finding means to limit the coverage of ADA Title III. A significant means by which courts have accomplished this objective, as discussed later in this paper,⁷⁶ is by holding that Title III applies only with respect to the physical premises of public accommodations, but not to the programs or activities of such public accommodations. Another example of the means by which courts have limited the applicability of Title III is found in cases holding that architects are not subject to the mandates of that Title.⁷⁷

ADA Title III provides, *inter alia*, that:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.⁷⁸

The term "discrimination" in Title III is defined as including, *inter alia*, "a failure to design and construct facilities . . . that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable [to meet such accessibility requirements]."⁷⁹ The latter proviso specifically applies to those sections of Title III, such as the section quoted above, relating to those who own, lease (or lease to), or operate a place of public accommodation (collectively known as "public accommodations"), and to those sections of Title III relating to "commercial

⁷⁶ See *infra* text accompanying notes 138–51.

⁷⁷ See, e.g., *United States v. Days Inns of Am.*, 8 Am. Disabilities Cas. 491, 494 (1998); *United States v. Days Inns of Am., Inc.*, 22 F. Supp.2d 612 (E.D. Ky. 1998); *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Engineers, P.C.*, 945 F. Supp. 1 (D.D.C. 1996), *aff'd*, 117 F.3d 579 (D.C. Cir. 1997).

⁷⁸ 42 U.S.C. § 12182(a) (1994).

⁷⁹ § 12183(a)(1).

facilities,”⁸⁰ which are defined in Title III as, *inter alia*, facilities whose operations will affect commerce.⁸¹

In recognition of Title III’s prohibition against the design and construction of inaccessible facilities, the Department of Justice (DOJ), charged with responsibility for enforcing Title III, has consistently held that architects can be held liable for violating ADA Title III.⁸² Nevertheless, some courts have held that architects cannot be held liable under Title III for the failure to design and construct accessible facilities, because the Title III language pertaining to design and construction applies only to those that are public accommodations (i.e., those who own, lease, or operate a place of public accommodation), and architects are not public accommodations.⁸³ Those courts disregard the fact that the statutory language pertaining to design and construction specifically states that it applies to the conduct of both public accommodations and commercial facilities.⁸⁴

Such reasoning, of course, ignores the statutory language specifically applying the mandate pertaining to accessible design and construction to commercial facilities.⁸⁵ More importantly, such reasoning serves to limit the circumstances under which ADA Title III applies,⁸⁶ and actually permits the design of new facilities that are not accessible to people with disabilities—in direct contravention of Title III’s purpose. The courts applying such reasoning seem troubled by the ADA’s mandate that affirmative steps be taken to ensure that newly constructed and altered facilities are designed and built in such a manner so as to be fully accessible to people with disabilities. These courts view this “affirmative action” mandate as going beyond the traditional civil-

⁸⁰ Section 12183(a) defines “discrimination” as that term is to be “applied to public accommodations and commercial facilities.”

⁸¹ See §§ 12181(2), 12183(a). Only those provisions of Title III requiring that newly constructed or altered facilities be accessible to persons with disabilities apply to commercial facilities that are not also public accommodations. The intent was to make new construction and alteration of places where employment would occur accessible to individuals with disabilities.

⁸² See, e.g., *Patrick*, 8 NDLR & 282 (DOJ 1995) (advisory opinion). Note also that the DOJ was the plaintiff in *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262 (D. Minn. 1997), in which it was contended that architect defendants violated ADA Title III.

⁸³ See *supra* cases cited in note 77.

⁸⁴ See *supra* text accompanying note 80.

⁸⁵ In *Ellerbe Becket, Inc.*, 976 F. Supp. at 1267–69, the court ruled exactly that, and held, contrary to the courts cited in note 77, *supra*, that architects *can* be held liable under Title III for the failure to design accessible facilities.

⁸⁶ At least one commentator has cited this reasoning as an example of the judicial backlash against the ADA in particular and civil rights principles in general. See Colgate, *supra* note 6.

rights/nondiscrimination principles that they deem to be the ADA's primary concern.

These three examples illustrate some of the means by which the courts have attempted to limit the circumstances under which entities are obligated to provide affirmative assistance for people with disabilities.⁸⁷ Clearly, many courts are uncomfortable with the notion that certain segments of society, or even society-at-large in the form of benefits provided by state and local government entities, must bear the responsibility for affirmatively assisting people with disabilities to take part in mainstream society. These courts either do not understand, or do not accept, the concept of reasonable accommodations as part and parcel of the nondiscrimination principle. They appear to view the provision of reasonable accommodations as an "extra" requirement that goes beyond simple nondiscrimination precepts, have chosen to focus on the traditional civil-rights/basic nondiscrimination mandate expressed in the ADA, and ignore the arguably conflicting affirmative action mandate. In this manner, individuals with disabilities are shepherded through a revolving door. They are permitted entry halfway into the mainstream via traditional equality principles, but are quickly ushered back to their isolated starting point by being denied the reasonable accommodations necessary to provide *meaningful* civil rights or accessibility.

B. *Following the "Race Neutral" Concept of Civil Rights Laws*

A second reason that the civil rights model may have served to hamper achievement of the ADA's objectives is that the "race neutral" concept of the Civil Rights Act of 1964 is inapplicable to most cases involving different treatment of individuals with disabilities.

Discrimination on the basis of race and "discrimination" on the basis of disability are two different animals, which bear only a passing resemblance to one another.⁸⁸ The principles underlying the two forms of different treatment are very different, and thus the means of eradicating those forms of different treatment must necessarily be very different. The core of the Civil Rights Act is

⁸⁷ These examples are just a drop in the bucket. Unfortunately, it is not possible in this brief article to provide an overview of the multitude of other situations in which courts have narrowed the scope of the ADA.

⁸⁸ Indeed, some people of color have told this author that they are insulted by efforts to categorize discrimination on the basis of race and discrimination on the basis of disability as similar societal problems to be resolved in a similar manner. As one Black individual told me, I, as a deaf person, lack one of the five basic senses; she, as a Black person, does not. I have a physical disability that inherently limits my ability to function in some situations. She, to the converse, is not inherently limited in her ability to function in any situation. To say that we face similar societal problems because she is Black implies that her race constitutes some sort of deficiency.

the “race neutral” principle, pursuant to which an individual’s race is irrelevant and must be ignored when making employment decisions affecting that individual (or when making decisions affecting that individual’s ability to participate in other aspects of mainstream society). An analogous “disability neutral” principle does not, and cannot, apply in most cases arising under the ADA. Many courts, however, are unable to disregard the neutrality precept when deciding ADA cases, because the ADA is premised on the Civil Rights Act—which is, in turn, premised on the neutrality precept.

1. *Intentional Discrimination*

When the Civil Rights Act was enacted in 1964, discrimination on the basis of race was viewed as being largely premised on a hostile animus—as being generally intentional.⁸⁹ The focus of the Act was on actions taken due to bias or hostility, such as those presented in the following examples: a restaurant or theater owner who refused to admit Blacks did so intentionally due to feelings of hostility or bias toward people who are Black; an employer who refused to hire Blacks did so intentionally due to feelings of hostility or bias toward people who are Black; states requiring Black children to attend separate schools did so intentionally due to feelings of hostility or bias toward people who are Black. The Civil Rights Act recognized that the color of a person’s skin does not create any meaningful distinctions between that person’s capabilities and the capabilities of other persons. The Black person’s skin color, in and of itself, does not make him or her less capable of eating in a restaurant, watching a theater presentation, attending school, or performing a job. There are no inherent differences based on race that lead, unintentionally, to different treatment of people of different races. Such distinctions are generally created irrationally, by people or entities engaging in intentional discrimination—largely in the form of deliberate segregation—based on bias or prejudice against people of color. The Civil Rights Act was geared primarily toward prohibiting, and eradicating, this type of irrational, intentional discrimination.

Some discrimination against people with disabilities has also been, and continues to be, intentional—premiered on irrational bias or stereotypes. Numerous examples of such intentional discrimination were discussed during the legislative hearings prior to enactment of the ADA. One person with a disability recounted a situation in which people attempted to remove her and her friend with a disability from an auction house because they were “disgusting to look at.”⁹⁰ Another person with a disability recounted a 1988 incident in which the

⁸⁹ See generally WHALEN, *supra* note 23 (noting that the Civil Rights Act was enacted primarily to eradicate the intentional segregation of Blacks).

⁹⁰ S. REP. NO. 101-116 at 7 (1989) (testimony by Judith Heumann, World Institute on

owner of a movie theater prohibited her from entering his theater and argued, "I . . . don't have to let her in here, and I don't want her in here."⁹¹ These types of discriminatory action are analogous to the types of intentional discriminatory action the Civil Rights Act focused on at the time of its enactment. To the extent that the ADA intends to prohibit and eradicate such intentionally discriminatory conduct, the statutory model patterned after the Civil Rights Act is appropriate and applicable.

2. *Disparate Impact Discrimination*

In some respects, the congressional hearings leading to enactment of the ADA focused too extensively on the intentional discrimination faced by people with disabilities—particularly the intentional segregation of people with disabilities.⁹² While people with disabilities *have* historically been subjected to intentional discrimination, it is well recognized that *most* different treatment of people with disabilities is not based on intentional discrimination, premised on irrational bias or hostility. The Supreme Court noted in *Alexander v. Choate*⁹³ that Congress has recognized that different treatment of people with disabilities is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect,"⁹⁴ and that "[f]ederal agencies and commentators on the plight of the handicapped . . . have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus."⁹⁵

The more frequent scenario concerning different treatment of people with disabilities involves not the deliberate, affirmative exclusion from programs or activities, but the passive failure to provide affirmative assistance to make inclusion possible. For example, no theater owner has told me that I may not enter his theater, but all theater owners have passively refrained from making the movies in their theaters accessible to me—through either open or closed captioning. It is not the theater owners' intentional, affirmative act, premised on hostility or bias, that has resulted in my being unable to watch the movies shown at their theaters. (In fact, I suspect that theater owners would be pleased if I *was* able to watch the movies shown at their theaters, for I might then become a

Disability).

⁹¹ *ADA: Hearings*, *supra* note 25, at. 64–65 (testimony of Lisa Carl).

⁹² *See* Cook, *supra* note 40 (focusing on the need for the ADA to eradicate the historical intentional segregation of people with disabilities). The legislative history of the ADA also discusses numerous examples of intentional discrimination. *See supra* notes 90–91.

⁹³ 469 U.S. 287 (1985).

⁹⁴ *Id.* at 295.

⁹⁵ *Id.* at 296.

paying customer.) Rather, it is the theater owners' passive failure to affirmatively spend money or incur other burdens to provide captioned movies to make the theater accessible to me that immortalizes the existing "differentness" of my status. To the extent that this passivity constitutes discrimination, it is defined as disparate impact discrimination rather than intentional discrimination.

Of course, disparate impact discrimination on the basis of race is also prevalent. Thus, since 1971 courts have interpreted the Civil Rights Act as prohibiting disparate impact discrimination as well as intentional discrimination,⁹⁶ and in 1991 (one year *after* the ADA's enactment), the Civil Rights Act's proscription against disparate impact discrimination was codified in the Civil Rights Restoration Act.⁹⁷ For several reasons, however, the Civil Rights Act's prohibition of both intentional and disparate impact forms of discrimination does not constitute an appropriate model upon which to base the ADA's proscription against disability based discrimination.

We have already seen that most discrimination against people with disabilities constitutes disparate impact discrimination. Unlike the color of a person's skin, a disability *itself* often constitutes an inherent physical or mental difference that, in the absence of affirmative assistance or accommodation, results in the different treatment that the ADA terms discriminatory. In most cases it is the simple maintenance of the status quo that constitutes the prohibited different or discriminatory treatment. When the Civil Rights Act was enacted in 1964, however, discrimination on the basis of race was viewed as being primarily intentional in that individual action or design was seen to *create* the differentness or discrimination (i.e. the segregation); the illegal conduct under the Civil Rights Act was viewed as the "active" differential treatment based on race. In the more prevalent disability setting, to the converse, individual action or design resolves *inherent* differentness or discrimination; thus the illegal conduct prescribed by the ADA is the passive failure to make necessary (reasonable) accommodations to eliminate that inherent differentness or discrimination.

The fact that the most prevalent form of discrimination on the basis of disability constitutes disparate impact discrimination, whereas the Civil Rights Act of 1964 was enacted primarily for the purpose of preventing intentional discrimination, renders the Civil Rights Act model inherently troublesome for cases arising under the ADA. To prevent the principal form of discrimination on the basis of race at issue when the Civil Rights Act was enacted—that based on

⁹⁶ The courts have interpreted the Civil Rights Act of 1964 as prohibiting disparate impact discrimination at least since the Supreme Court decided *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁹⁷ Civil Rights Restoration Act of 1991, Pub. L. 102-166 (codified 42 U.S.C. § 2000e-2(k)(1)(A) (1994)). Section 105 of that Act provides a definition of disparate impact discrimination.

irrational bias or hostility—that Act requires individuals or entities to follow a “race neutral” approach. Congress theorized that because an individual’s race is irrelevant when considering that individual’s capabilities, race must play no factor in any decision made by entities covered under the Civil Rights Act. To prevent the more prevalent form of discrimination on the basis of disability, however, individuals or entities *cannot* follow a “disability neutral” approach. To ignore the disability is to implement the status quo, which reinforces and prolongs the inherent differentness caused by the disability and constitutes impermissible discrimination under the ADA. This fundamental difference between the premises upon which the Civil Rights Act and the ADA were based renders the former an inappropriate statutory model for the latter.⁹⁸

In addition, neither Congress nor the courts have favored the disparate impact discrimination claims of members of minority races (or those of women), and that general disfavor has become much more prominent in recent years.⁹⁹ It took twenty-seven years for Congress to enact the Civil Rights Restoration Act codifying the disparate impact theory of discrimination under the Civil Rights Act. And the courts are proving even *more* reluctant to enforce the prohibition of

⁹⁸ One early commentator, discussing the problems inherent in premising section 504 of the Rehabilitation Act on civil rights laws protecting racial minorities and women, noted that the prohibition of disparate impact discrimination serves two primary purposes: (1) it serves as a means of ferreting out subtle forms of discrimination, pursuant to which intentional discrimination is masked by facially neutral policies; and (2) it serves as a means of taking steps “to ensure that the vestiges of past [intentional] discrimination, as reflected in disparate impact statistics, are totally eliminated.” Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1450–51 (1986). Professor Rebell argued that these principles did not generally apply in the context of discrimination against people with disabilities, because:

In the handicapped context, . . . where invidious animus often is not the predominant cause of discrimination, a legal standard geared toward ferreting out subtle forms of discriminatory intent, or making whole the victims of past invidious animus, will not, ipso facto, be dealing with the fundamental issues. Here, a showing of disparate impact cannot automatically justify remedial action because it cannot be presumed to reflect any underlying past or present discriminatory intent, even when not adequately explained. Without some intentionally discriminatory acts to provide a basis for ultimate liability, some further justification is required to establish why an “innocent” defendant should be put to the trouble or expense of changing practices which “happen” to cause difficult[y] for the handicapped.

Id. at 1451.

⁹⁹ For a good discussion of this point, see Diller, *supra* note 6. See also, Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 YALE J.L. & FEMINISM 195 (1995) (explaining that the courts have been more receptive to the Title VII claims made by white males than to the Title VII claims made by women or members of racial minorities).

disparate impact discrimination against individuals with disabilities.¹⁰⁰ Indeed, recent data analyzing both Title VII and ADA Title I cases between January 1 and July 1, 1999, evidences that Civil Rights Act Title VII plaintiffs fared much better in the courts than did ADA plaintiffs.¹⁰¹

Race-based disparate impact discrimination differs significantly from disability-based disparate impact discrimination, in that disparate impact discrimination on the basis of disability often involves a covered entity's refusal to spend money, incur administrative or other burdens, or simply to treat a person with a disability in some "special" manner that may not be burdensome—to provide accommodations for an individual with a disability. On the other hand, cost, the incurrence of burdens, or the provision of "special treatment" are usually *not* issues in race-based disparate impact discrimination, although they usually *are* issues in disability-based disparate impact discrimination. It is not surprising, therefore, that there is even greater judicial reluctance to recognize disparate impact discrimination in the disability context than in the race context. The reluctance of courts to accept disparate impact theories of discrimination in general, and the more specific reluctance of courts to accept cost- or burden-based disparate impact theories of discrimination in the disability context, does not bode well for future judicial implementation of the ADA.

Compare, for example, two possible disparate impact discrimination claims—one arising under the ADA and the other arising under the Civil Rights Act. Suppose I file an action under the ADA claiming that the providers of telephone communication systems are discriminating against people who are deaf. I do not claim intentional discrimination, for no provider of telephone services has intentionally prohibited me from using the telephone. However, the telephone system was designed to operate via voice and hearing. That design has a disparate impact on those of us who are deaf—we have been unintentionally excluded from participating in society's telephone communication system. My claim is analogous to a discrimination claim asserted by African Americans under the Civil Rights Act, that standardized educational tests have a disparate impact on African Americans, who have faced social and economic disadvantages not faced by members of other races, which has resulted in the unintentional exclusion of African Americans from our system of higher education.

In this age of judicial hostility toward civil rights claims and affirmative action,¹⁰² the courts are not likely to be receptive to either my claim on behalf of

¹⁰⁰ See *supra* articles cited in note 6.

¹⁰¹ See Colker, *Winning*, *supra* note 6.

¹⁰² See, e.g., Diller, *supra* note 6; Linda Hamilton Kreiger, *Backlash against the Americans with Disabilities Act: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

people who are deaf or the claim made on behalf of African Americans. However, I suspect that the courts would be even less supportive of my claim, because: (1) the number of deaf people in the United States is presumably significantly smaller than the number of African Americans, and thus fewer people would benefit from the redesign at issue; (2) the cost of redesigning the telephone system would arguably be significantly higher than the cost of redesigning post-secondary admissions tests; (3) it may be technologically infeasible, if not impossible, to redesign the telephone system; and (4) society-at-large continues to view disabilities as "unnatural," and most people are not accepting of the proposition that the "natural" state of society should be viewed as that which is accessible to the most disabled among us.¹⁰³

¹⁰³ This latter point is debatable. There appears to be great societal resistance to modifying the "merit principle" by changing testing instruments or procedures to accommodate people of minority races. That resistance may be as great as societal resistance toward making expensive global changes to make all of society accessible to all people with disabilities.

A word of explanation is required with respect to the proposition that the natural state of society should be viewed as that which is accessible to the most disabled among us. Advocates for people with disability have long argued that disability is but one form of the "human constant." Jessica Scheer & Nora Groce, *Impairment as a Human Constant: Cross-Cultural and Historical Perspectives on Variation*, 44 J. SOC. ISSUES 23 (1988). See generally ROBERT M. VEATCH, *THE FOUNDATIONS OF JUSTICE: WHY THE RETARDED AND THE REST OF US DESERVE EQUALITY* (1986); ANITA SILVERS, DAVID WASSERMAN AND MARY B. MAHOWALD, *DISABILITY, DIFFERENCE, DISCRIMINATION* (1998). In accord with this reasoning, it is argued that the "normal" state of society should be viewed as one that is accessible to all people in all circumstances. Following this principle, all buses, trains, and other modes of transportation should be fully accessible to all people who are mobility impaired; in every place where a voice telephone is available, a TDD should also be available for people who are deaf; every book and every visual sign should also be written in Braille or accompanied by audio script—regardless of the number of people (if any) who would benefit from such full accessibility. Such a scenario should be viewed as the norm, and instances in which society is not fully accessible should be viewed as abnormal. See, e.g., Asch Letter, *supra* note 35. See also Burgdorf, *supra* note 6 at 515–24. Professor Burgdorf relies in part on the U.S. COMM'N ON CIVIL RIGHTS, *ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES* (1983), in arguing that we should not look to one state of being as "normal" and another state of being as "abnormal," but that we should view all states of being as normal, with different people falling along different places of the very broad spectrum of normality.

While I cannot help but appreciate this utopian concept in theory (what I wouldn't give to be able to use the phone at any time in any place!), I do not see society-at-large, including the courts, as coming to accept this precept for many generations to come—if ever. The view that many disabilities are "unnatural" conditions is hardly unreasonable; after all, can it really be said that it is "natural" to lack the ability to hear, to see, or to walk? Thus, while most people—including the courts—will hopefully come to accept the principle of providing reasonable accommodations for people with "unnatural" conditions, I question whether they will come to accept the unnatural as natural and willingly agree to reverse the norms of society.

In sum, people with disabilities are severely disadvantaged by the fact that the ADA is premised on the antidiscrimination model of the Civil Rights Act, because: (1) the Civil Rights Act was designed primarily to eradicate intentional discrimination; (2) most cases involving discrimination on the basis of disability involve disparate impact discrimination rather than intentional discrimination based on bias and hostility, and thus the "race-neutral" concept of the Civil Rights Act is inapplicable to most ADA cases; (3) although the Civil Rights Act has been utilized and expanded to cover disparate impact discrimination, race-based disparate impact discrimination generally takes a different form than disability-based disparate impact discrimination; and (4) the courts tend to disfavor disparate impact discrimination claims in general, and are beginning to show even less support for the cost-based disparate impact discrimination claims of people with disabilities.

Two striking examples of the manner in which the Civil Rights Act "neutrality" model has had an adverse impact on the ADA discrimination claims of individuals with disabilities are seen in: (a) cases discussing the issues of whether, and when, damages may be awarded to the plaintiff who proves he or she has been discriminated against in violation of ADA Title II, and (b) cases discussing the responsibilities of insurers under ADA Title III. Again, these cases illustrate the manner in which the courts shepherd individuals with disabilities through a revolving door. Individuals with disabilities are theoretically permitted basic access to the mainstream, but, due to application of the "disability neutral" principle, they are immediately herded back to their isolated starting point.

(a) *Damages for Violations of ADA Title II*

Title II of the ADA prohibits state and local government entities from discriminating on the basis of disability.¹⁰⁴ To fulfill this nondiscrimination mandate, state and local government entities must ensure that all of their programs, services, and facilities, when viewed in their entirety, are accessible to people with disabilities.¹⁰⁵ Thus, state and local government entities must make reasonable modifications in policies, practices, or procedures to accommodate the needs of people with disabilities.¹⁰⁶

ADA Title II incorporates the remedies provisions of section 505 of the Rehabilitation Act,¹⁰⁷ which, in turn, incorporates the remedies provisions of Title VI of the Civil Rights Act.¹⁰⁸ The remedies available to plaintiffs who have

¹⁰⁴ 42 U.S.C. §§ 12131–12133 (1994).

¹⁰⁵ See generally TUCKER & GOLDSTEIN, *supra* note 4, at ch. 25.

¹⁰⁶ *Id.*

¹⁰⁷ 29 U.S.C. § 794a (1994).

¹⁰⁸ As previously noted, see *supra* notes 19 & 20, Title VI prohibits recipients of federal

been discriminated against on the basis of disability by state or local government entities, therefore, are to mirror the remedies available to plaintiffs who have been discriminated against on the basis of race or disability by recipients of federal financial assistance.

The Supreme Court has ruled that only plaintiffs who have been intentionally discriminated against on the basis of race in violation of Title VI of the Civil Rights Act may recover compensatory damages.¹⁰⁹ In order to recover such damages, a plaintiff who has been discriminated against on the basis of race must prove that the defendant acted with "discriminatory animus."¹¹⁰ Following the precept that the same principles applicable to cases arising under Title VI must also be applied to cases arising under ADA Title II, courts have held that intentional discrimination, in the form of discriminatory animus or deliberate indifference to the plaintiff's rights that is akin to discriminatory animus, is a prerequisite to an award of compensatory damages to a plaintiff who has been discriminated against in violation of ADA Title II.¹¹¹

The obvious problem is that most cases in which a state or local government entity is held to have violated ADA Title II involve disparate impact discrimination, rather than intentional discrimination.¹¹² Thus, application of the Civil Rights Act Title VI rule requiring a showing of intentional discrimination as a prerequisite to an award of compensatory damages to ADA Title I cases ultimately results in compensatory damages being unavailable under Title II. Such an incongruous result contravenes the very precepts upon which ADA Title II was based; it leaves people with disabilities with no remedies, or less than

financial assistance from discriminating on the basis of race, while section 504 of the Rehabilitation Act, to which the remedies set forth in section 505 apply, prohibits recipients of federal financial assistance from discriminating on the basis of disability. The remedies provision of Title VI of the Civil Rights Act provides that remedies for violations of the Act include the termination of, or refusal to grant, federal funding to the entity in violation of the Act, or any other remedies authorized by law. 42 U.S.C. § 2000d-1 (1994).

¹⁰⁹ *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983).

¹¹⁰ *Id.* at 584.

¹¹¹ *See Aikins v. St. Helena Hosp.*, 843 F. Supp. 1329 (N.D. Cal. 1994).

¹¹² Not all discriminatory conduct under ADA Title II constitutes intentional discrimination, however. The purposeful segregation of people with disabilities by state or local government entities is more appropriately labeled intentional, rather than disparate impact, discrimination. *See Susan Stefan, The Americans with Disabilities Act and Mental Health Law: Issues for the Twenty-First Century*, 10 J. CONTEMP. LEGAL ISSUES 131 (1999). Professor Stefan observes that the ADA's integration mandate differs from the reasonable accommodation mandate, in that the former does not require the affirmative provision of new services, but is a prerequisite to the provision of the latter, for people with disabilities must be permitted to integrate into mainstream society before they may be provided with reasonable accommodations. Professor Stephan appropriately characterizes the segregation of people with disabilities, by means such as institutionalization, as intentional discrimination.

adequate remedies, for violations of Title II, and provides an incentive to state and local government entities to perpetuate discrimination against people with disabilities.¹¹³ The case of *Ferguson v. City of Phoenix*¹¹⁴ serves to illustrate these points.

The plaintiffs in *Ferguson* were several deaf individuals who had made at least twenty-four unsuccessful attempts, during different emergencies occurring over a period of approximately seventeen months, to reach the City of Phoenix's 9-1-1 system. The City's 9-1-1 services were simply not accessible to people who used TDDs, for a variety of reasons. The City initially had only one TDD for use by its more than thirty stations having 9-1-1 operators; at some point that number was increased to two TDDs. An individual who called 9-1-1 via TDD was required to hit the space bar on his or her TDD, which in theory was supposed to cause emission of a tone that would allow the responding operator to know that a TDD caller was on the line, which would, in turn, cause the responding operator to transfer the call to the one (and later two) operator station(s) having a TDD. This system did not work, for several reasons. First, TDD users do not usually hit the space bar after TDD calls they have placed are answered, so most TDD users were not aware of the requirement that they must follow such a procedure in a 9-1-1 emergency situation. Second, hitting the space bar at that point in the telephone call causes many TDDs to disconnect the line. Third, even when TDD callers did hit the space bar on their TDDs, and even when their TDDs did not disconnect as a result, the 9-1-1 operators usually did not respond to the TDD calls. The 9-1-1 operators had not been trained to recognize the tone sometimes emitted when the space bar was pressed, and thus, the operators treated all calls in which no person responded to the operator's introduction as "hang-up" calls. Furthermore, even if the 9-1-1 operator did recognize the TDD tone, the call often could not be responded to by the operator at the one (or two) operator station(s) having a TDD because the operator to whom the call was transferred was on the voice phone, and thus, the phone line at his or her station was busy.

Plaintiffs and others complained to the city repeatedly during this seventeen month period that its 9-1-1 system was not accessible to people who use TDDs. The city was furnished with a copy of relevant portions of the Department of Justice's (DOJ) ADA Title II Technical Assistance Manual, which states, *inter alia*, that providers of 9-1-1 services are not permitted to require TDD callers to comply with additional dialing or space bar requirements.¹¹⁵ Nevertheless, the city did not eliminate its space-bar requirement, obtain additional TDDs, or otherwise make its 9-1-1 system accessible to deaf callers until after (1) plaintiffs filed three separate lawsuits under ADA Title II (which were subsequently

¹¹³ See *infra* text accompanying notes 124–134.

¹¹⁴ 931 F. Supp. 688 (D. Ariz. 1996), *aff'd*, 157 F.3d 668 (9th Cir. 1998).

¹¹⁵ DOJ, MANUAL, *supra* note 55, at § II-7.3100.

consolidated), (2) the parties engaged in months of discovery and made and defended numerous judicial motions, and, (3) ultimately, a consent order was entered, which required specifying in detail the manner in which the city must make its 9-1-1 system accessible to people who use TDDs.

The district court held that the city had violated ADA Title II by failing to make its 9-1-1 system accessible to people who are deaf.¹¹⁶ The court found that the DOJ's position with respect to the space bar was "reasonable," due to the necessity of removing discrimination against 9-1-1 callers who are deaf, and held that the fact that the city disagreed with the DOJ's rules was irrelevant. Following principles developed under the Civil Rights Act, however, the district court held that compensatory damages were only available under section 504 of the Rehabilitation Act and ADA Title II if the City's discriminatory conduct was intentional. The court did not follow the test for intentional discrimination set forth by the Supreme Court in *Guardians Association v. Civil Service Commission*,¹¹⁷ but borrowed the test for intentional discrimination followed in § 1983 cases.¹¹⁸ Applying that test, the court held that the City's conduct could be held to be intentional if only the City acted "with at least deliberate indifference to the strong likelihood that a violation of federally protected rights" would result from its actions.¹¹⁹ With respect to the City's deliberate refusal to adhere to the DOJ's "no space-bar" rule, the district court held that unless plaintiffs could show that either (1) the city knew that the DOJ's Technical Assistance Manual had the force of law or (2) the city "did not have a good faith belief that the Manual did not have the force and effect of law, the City [could not] be held to have acted intentionally or with deliberate indifference to plaintiffs' rights."¹²⁰ The district court did not address any other evidence introduced by plaintiffs relating to the city's conduct.

The primary issues on appeal were whether intentional discrimination is a prerequisite to an award of compensatory damages against a defendant who has violated ADA Title II and section 504, and, if so, what constitutes the standard for defining the requisite intent. The majority of the Ninth Circuit relied on *Guardians* when ruling that intentional discrimination is a prerequisite to an award of compensatory damages under ADA Title II and section 504.¹²¹ The Ninth Circuit declined to decide what standard of intent should be applied in section 504 and ADA Title II cases, but held that plaintiffs could not show that the city acted with intentional discrimination under either the "discriminatory

¹¹⁶ *Ferguson*, 931 F. Supp. 688 (D. Ariz. 1996).

¹¹⁷ 463 U.S. 582 (1983).

¹¹⁸ See 42 U.S.C. § 1983.

¹¹⁹ *Ferguson*, 931 F. Supp. at 697.

¹²⁰ *Id.*

¹²¹ *Ferguson v. City of Phoenix*, 157 F.3d 668 (9th Cir. 1998).

animus" test set forth in *Guardians* or the "deliberate indifference" test applied by the district court.¹²²

The Ninth Circuit simply applied by rote the judicially crafted rule relating to awards of damages under Title VI of the Civil Rights Act to cases arising under ADA Title II.¹²³ This reasoning ignores several important principles.

First, the Ninth Circuit's reasoning contravenes the remedial scheme devised by Congress. Congress expressly overruled states' Eleventh Amendment immunity to suit under ADA Title II and specifically provided that states are subject to remedies at both law and equity for violations of ADA Title II.¹²⁴ The Supreme Court has held that unless Congress clearly limits the remedies available under a federal statute, the full panoply of remedies must be available under that statute.¹²⁵ When enacting the ADA, Congress expressly chose to limit the remedies available in some titles of the Act, but not to limit the remedies available under other titles. Thus, Congress limited the remedies available to private parties who are discriminated against in violation of ADA Title III to preventative relief,¹²⁶ but placed no limitations at all on the remedies available to private plaintiffs who are discriminated against in violation of ADA Title II. Initially Congress also limited the remedies available to plaintiffs discriminated against in violation of ADA Title I to equitable remedies,¹²⁷ but again chose not to place similar limitations on the remedies available under Title II. Subsequently, when enacting the Civil Rights Act of 1991, Congress made damages available under ADA Title I, but limited the availability of such damages to cases involving intentional discrimination, prohibited an award of damages in cases in which the employer demonstrates good faith efforts to comply with the Act, and capped the amount of damages that can be awarded based on the defendant employer's size.¹²⁸ Again, Congress chose not to extend those limitations to cases arising under ADA Title II.

In unthinkingly and rigidly applying the reasoning of judicial decisions interpreting the Civil Rights Act to cases arising under ADA Title II, the Ninth Circuit ignored the ADA's express remedial scheme and disregarded the

¹²² *Id.* at 675.

¹²³ A comprehensive article discussing the flaws in the district court's reasoning, followed in large part by the Ninth Circuit, is Leonard J. Augustine, Jr., Note, *Disabling the Relationship between Intentional Discrimination and Compensatory Damages under Title II of the Americans with Disabilities Act*, 66 G. WASH. L. REV. 592 (1998).

¹²⁴ 28 C.F.R. § 35.178 (1999).

¹²⁵ *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60 (1992).

¹²⁶ *See* 42 U.S.C. § 12188 (1994).

¹²⁷ *See* § 12117.

¹²⁸ § 1981a.

principle that the full panoply of remedies must be available under a federal statute unless Congress says otherwise.

Second, the Ninth Circuit's reasoning encourages state and local government entities to ignore the nondiscrimination mandate of ADA Title II. The Ninth Circuit held that a public entity that exhibits the usual "lack of knowledge and understanding" of its obligations to make its programs and facilities accessible and engages in "common bureaucratic inertia," has not engaged in intentional discrimination warranting an award of compensatory damages under Title II.¹²⁹ In effect, the Ninth Circuit ruled that state and local government entities are free to simply implement the status quo, without making any modifications or changes to their programs to make them accessible, until such time as some person with a disability files a lawsuit and a court orders the entity to comply with the law. Since an entity may not be held responsible for its failure to comply with ADA Title II absent a showing of discriminatory intent, it behooves the entity to sit passively and do nothing. In fact, the entity would be wise to refrain from learning what its obligations are under the ADA, because it will not be held responsible for violating any law of which it is unaware or which it believes, in good faith, does not apply to its passive conduct.¹³⁰ Because there are no penalties imposed if an entity waits to comply with the law until such time as a plaintiff prevails in court, it is to the entity's advantage to do exactly that.

The effect of the Ninth Circuit's reasoning is to encourage state and local government entities to ignore Title II's mandate to make their programs and facilities accessible to people with disabilities. The Ninth Circuit's ruling, therefore, defeats the purpose for which ADA Title II was enacted.

Third, the Ninth Circuit's reasoning denies persons harmed by discrimination on the basis of disability appropriate remedies, in contravention of Congressional intent. All of the plaintiffs in *Ferguson* allegedly suffered damages as a result of their inability to contact 9-1-1. The plaintiffs were never permitted to present evidence of the damages they suffered, however, since the court focused entirely on the city's motives in failing to make its 9-1-1 services accessible (motives which are difficult, at best, for plaintiffs to prove). Plaintiffs' damages were deemed irrelevant. The only remedy awarded to them was an order that the city's 9-1-1 services be made accessible in the future. In fact, the Ninth Circuit was so bold as to state that "equitable relief is sufficient to remedy the problem[s]"¹³¹ the plaintiffs suffered as a result of the city's violations of Title II, despite the fact that the plaintiffs had never been permitted to show what those problems were. In requiring proof of intentional discrimination as a prerequisite to an award of damages under ADA Title II, the Ninth Circuit has

¹²⁹ *Ferguson v. City of Phoenix*, 157 F.3d 668, 675 (9th Cir. 1998).

¹³⁰ See *supra* text at note 120.

¹³¹ *Ferguson*, 157 F.3d at 675.

left persons who have been discriminated against on the basis of disability by state or local governments without any remedy for past harms. The Ninth Circuit's ruling contravenes Congressional intent. Congress did not provide any indication of an intent to deny ADA Title II plaintiffs meaningful remedies for harm caused by violations of the Act.

Fortunately, the plaintiffs in *Ferguson*, at least, were able to obtain the benefit of prospective injunctive relief. Any of the plaintiffs still living¹³² will hopefully be able to access the city's 9-1-1 services in the future should the need ever arise. In many cases arising under ADA Title II, however, the plaintiffs are not able to obtain such prospective relief. In order to have standing to obtain injunctive relief, a plaintiff must demonstrate that it is likely that he or she will suffer harm due to future discriminatory actions of the defendant.¹³³ In many instances courts have held that ADA plaintiffs did not satisfy that prerequisite, and thus have ruled that the plaintiffs could not seek injunctive relief for violations of the ADA. To cite just one example, in *Aikins v. St. Helena Hospital*¹³⁴ a deaf woman claimed that a hospital violated ADA Title III by refusing to provide her with interpreters to enable her to understand what hospital personnel were saying to her, which had the effect of rendering the services provided to her by the hospital ineffective. The court held that the deaf woman lacked standing to seek injunctive relief under Title III, because there was no evidence showing that she would require the services of that hospital in the future.¹³⁵

There are many situations in which an individual with a disability could suffer harm due to a state or local government entity's violation of ADA Title II, but would be precluded from seeking injunctive relief against that entity due to the inability to show that he or she would suffer from the entity's future discriminatory conduct. Imagine that Joe, a resident of New York who is deaf, takes a vacation in California. While in California he becomes ill and is admitted

¹³² One of the plaintiffs died during the pendency of the action.

¹³³ See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

¹³⁴ 843 F. Supp. 1329 (N.D. Cal. 1994).

¹³⁵ *Id.* at 1333. See also *Proctor v. Prince George's Hosp. Ctr.*, No 96-1870, 1998 U.S. Dist. LEXIS 21830 (D. Md. Nov. 20, 1998) (finding that a deaf plaintiff who was denied sign language interpreters during, inter alia, discussions with doctors regarding the need to amputate his lower leg, could not be awarded injunctive relief against the hospital because the plaintiff did not show that he was likely to return to the defendant hospital in the future); *Naiman v. N.Y. Univ.*, No. 95 Civ. 6469, 1997 WL 249970 (S.D.N.Y. May 12, 1997) (denying injunctive relief to a deaf patient who visited a hospital four times but did not show that he would require the services of that hospital again in the future); *Hoepfl v. Barlow*, 906 F. Supp. 317 (E.D. Va. 1995) (finding that the plaintiff lacked standing to seek injunctive relief requiring a dentist who had refused to treat people with AIDS to do so in the future, because there was no evidence that any future discriminatory conduct by that dentist would be likely to harm that plaintiff).

to a state hospital. The hospital refuses to provide Joe with an interpreter. As a result Joe misunderstands the doctor's words and thus mistakenly agrees to undergo or to refrain from undergoing a medical procedure. Or suppose that Joe visits a California state park or museum with a group of friends, and the exhibits at the facility are primarily in audio format but the facility has refused to either caption or provide a script of the exhibits. The bulk of the exhibits at the facility are thus inaccessible to Joe, and he spends three hours sitting in the lobby waiting for his friends while they enjoy the museum. While Joe has suffered harm in both instances as a result of those entities' violations of ADA Title II, no remedy is available to Joe in either case. He cannot seek compensatory damages, because the discrimination at issue in both cases was not intentional but resulted from simple bureaucratic inertia and a lack of understanding of the defendants' responsibilities under the ADA. Also, Joe cannot seek injunctive relief because it is unlikely that he will visit either the California state hospital or the California state museum in the future and would thus suffer future harm as a result of those entities' violations of ADA Title II. In such situations, plaintiffs are denied *any* remedies for violations of Title II.

Congress clearly did not intend these results. Congress expressly permitted such unfortunate results under ADA Title III by limiting the relief that people with disabilities could obtain from private business people. To the converse, because it believed that state and local government entities should have greater responsibilities than private business people to make their programs and facilities accessible to all members of society, Congress deliberately chose not to limit the relief that people with disabilities could obtain from state and local governments, and thus did not limit the remedies under ADA Title II. The Ninth Circuit's ruling leads to the opposite result that Congress intended when devising the ADA's remedial scheme.

In sum, in *Ferguson v. City of Phoenix* the Ninth Circuit cavalierly applied judicial precepts developed to foster the goals of the Civil Rights Act to cases arising under ADA Title II, without considering the different concepts on which those two laws are premised, and without giving recognition to the significant differences between the primary forms of discrimination prohibited by the two Acts. Therefore the Ninth Circuit applied civil rights principles to defeat the reasonable accommodation requirements of ADA Title II.¹³⁶ Unfortunately, the

¹³⁶ Other courts have reached similar results. *See, e.g.,* *Tyler v. City of Manhattan*, 118 F.3d 1400 (10th Cir. 1997) (affirming the district court's ruling that intentional discrimination is a prerequisite to an award of compensatory damages under ADA Title II); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147 (10th Cir. 1999) (following *Ferguson* in holding that intentional discrimination is a prerequisite to an award of compensatory damages under laws prohibiting discrimination on the basis of disability, and further ruling that the standard for determining such intent is the "deliberate indifference" standard applied by the district court in *Ferguson*); *Brown v. King County Dep't of Adult Corr.*, No. C97-1909W, 1998 U.S. Dist.

LEXIS 20152 (W.D. Wash. Dec. 9, 1998) (following *Ferguson* in holding that intentional discrimination is a prerequisite to an award of compensatory damages under ADA Title II, but declining to rule at that juncture what standard must be satisfied to prove the requisite intent); *Memmer v. Marin County Courts*, 169 F.3d 630 (9th Cir. 1999) (following *Ferguson* in holding that intentional discrimination is a prerequisite to an award of compensatory damages under ADA Title II); *Matthews v. Jefferson*, 29 F. Supp. 2d 525 (W.D. Ark. 1998) (same).

In *Bartlett v. New York State Board of Law Examiners*, 970 F. Supp. 1094 (S.D.N.Y. 1997), a bar applicant with a learning disability alleged that a board of state bar examiners violated ADA Title II and section 504 by denying her requests that she be provided accommodations for her disability during a state bar examination. The district court held that the defendants had violated both Acts, and further held that intentional discrimination was a prerequisite to an award of compensatory damages under both Acts. However, the court drew a distinction between the standard for proving intent in a "failure to accommodate" case and the standard for proving intent in a case in which the defendant has acted intentionally due to bias or hostility. The court held that the "failure to accommodate" situation fell somewhere between a disparate impact and an intentional discrimination case and that:

[T]he question of intent in accommodations cases does not require that plaintiff show that defendants harbored an animus towards her or those disabled such as she. Rather, intentional discrimination is shown by an intentional, or willful, violation of the Act itself. With this understood, it becomes clear, that while defendants may have had the best of intentions, and while they may have believed themselves to be within the confines of the law, they nevertheless intentionally violated the ADA and the Rehabilitation Act by willfully withholding from plaintiff the reasonable accommodations to which she was entitled under the law.

Id. at 1151. On appeal, the Second Circuit declined to accept the district court's "willfulness" standard for proving the requisite intent, but followed *Ferguson* in applying the "deliberate indifference" standard of proof. *Bartlett*, 156 F.3d 321 (2d Cir. 1998). The Second Circuit held, however, that the plaintiff was entitled to recover compensatory damages because she had shown that the defendants acted with the requisite deliberate indifference. *Id.* The Supreme Court vacated the case for consideration of whether *Bartlett* was a disabled individual within the meaning of the ADA in accord with the Court's rulings in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (see *supra* note 52).

In *Tyler*, 118 F.3d 1400, a dissenting judge persuasively argued that there was no evidence that Congress intended to limit the recovery of damages under ADA Title II to cases involving intentional discrimination and, thus, that the court should follow the rule of *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), which mandates availability of the full panoply of remedies in the absence of congressional intent to the contrary. 118 F.3d at 1405-16 (Jenkins, J. dissenting). To date, however, the courts have generally declined to follow this reasoning. *Cf. Niece v. Fitzner*, 922 F. Supp. 1208 (E.D. Mich. 1996) (holding, without much discussion, that the full panoply of remedies is available under ADA Title II, and noting in footnote 9 that some courts have limited damages to cases of intentional discrimination but declining to address that issue since the plaintiff in that case had alleged intentional discrimination); *Hernandez v. City of Hartford*, 959 F. Supp. 125, 133-34 (D. Conn. 1997) (stating the general rule that compensatory damages are available under the ADA but not addressing the issue of intentional versus disparate impact discrimination).

ADA permits such a result, because it waffles between promoting civil rights principles and reasonable accommodation principles.¹³⁷

(b) *Obligations of Insurers under ADA Title III*

As previously noted,¹³⁸ ADA Title III prohibits all public accommodations from discriminating on the basis of disability. Title III specifically provides that public accommodations must allow people with disabilities to participate in an equal fashion or to benefit equally from the goods, services, facilities, advantages, or accommodations provided by the entity.¹³⁹

To fall within the definition of a public accommodation under Title III, an entity must fit within one of twelve specific categories.¹⁴⁰ One of those categories includes entities such as "a laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, *insurance office*, professional office of a health care provider, hospital, or other service establishment."¹⁴¹ Another section of the ADA, commonly referred to as section 501(c), provides, however, that insurers are not prohibited from (1) "underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law;" (2) "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law"; or (3) "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance"; as long as such conduct is not "used as a subterfuge to evade the purposes of [the ADA, including Title III]."¹⁴²

¹³⁷ Indeed, the remedial scheme of ADA Title II may itself be viewed as waffling between the two principles. On the one hand, Title II provides that the remedies under that Title are to be the same as the remedies under Title VI of the Civil Rights Act. On the other hand, Title II requires covered entities to take affirmative steps to make their programs and activities accessible to people with disabilities. Applying all of the rules relating to the remedies available under Title VI of the Civil Rights Act to ADA Title II, however, such as the rule that compensatory damages may be awarded only for intentional discrimination, has the anomalous effect of permitting—even encouraging—state and local governments to disregard the reasonable-accommodation requirements of Title II.

¹³⁸ See *supra* text at note 78.

¹³⁹ 42 U.S.C. §§ 12182(b)(1)(A)(i)–(iv) (1994).

¹⁴⁰ 42 U.S.C. § 12181(7) (1994).

¹⁴¹ § 12181(F) (emphasis added).

¹⁴² § 12201(c) (found in ADA Title V). This clause was initially section 501(c) of the ADA, before the Act was codified in the U.S.C., and thus came to be referred to as "section 501(c)."

Thus, ADA Title III specifically defines the offices of insurance companies as public accommodations, and ADA section 501(c) specifically provides that insurance companies are prohibited from writing or implementing insurance plans that are used as a subterfuge to avoid the nondiscrimination mandate of Title III. Despite those statutory provisions, numerous courts have held that insurers are *not* prohibited under Title III or section 501(c) from writing insurance plans that discriminate on the basis of disability, primarily for the reason that Title III only requires that the physical premises of insurance companies be accessible to persons with disabilities, but does not require that the practices or policies of such insurance companies be nondiscriminatory, or in other words, does not require that people with disabilities be permitted to benefit equally from the goods or services provided by such insurance companies.¹⁴³ A few courts have held that Title III prohibits both the denial of access to the physical structure of an insurance company and the refusal of an insurance company to sell an insurance policy to a person with a disability, but does not cover the terms and conditions set forth in such insurance policies.¹⁴⁴

¹⁴³ See, e.g., *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997) (finding that Title III covers discrimination only in the physical offices of an insurance company, but does not cover discrimination in the terms of the insurer's policies); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998) (similar); *McNeil v. Time Ins. Co.*, No. 98-10585, 2000 WL 217500 (5th Cir. Feb. 24, 2000) (similar); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000) (finding that Title III relates only to the availability of goods and services and not to their content); *Lenox v. Healthwise of Ky., Ltd.*, 149 F.3d 453 (6th Cir. 1998) (rejecting plaintiff's ADA Title III claim because plaintiff did not allege denial of access to a physical place); *Fennell v. Aetna Life Ins. Co.*, 37 F. Supp. 2d 40 (D.D.C. 1999) (finding that Title III does not govern with respect to commercial goods and services); *Erwin v. Northwestern Mut. Life Ins. Co.*, 999 F. Supp. 1227 (S.D. Ind. 1998) (finding that a public accommodation under Title III encompasses only the physical premises of an entity); *Pappas v. Bethesda Hosp. Ass'n*, 861 F. Supp. 616 (S.D. Ohio 1994) (finding that Title III does not apply to the sale of insurance contracts because the scope of Title III is limited to the ability of an individual with a disability to use a place of public accommodation).

This reasoning—that Title III applies only to the physical premises of a public accommodation—has been applied in cases involving entities other than insurance companies. See, e.g., *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995) (holding that a football league was not a public accommodation under Title III because Title III applies only to physical structures); *Brown v. 1995 Tenet ParaAmerica Bicycle Challenge*, 959 F. Supp. 496 (N.D. Ill. 1997) (finding that organizers of cross country bicycle tour were not public accommodations under Title III because they were not actual physical places); *Elitt v. USA Hockey*, 922 F. Supp. 217 (E.D. Mo. 1996) (finding that youth hockey club and sponsoring organization were not public accommodations under Title III because Title III only applies to physical structures).

¹⁴⁴ See *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999) (holding that Title III's nondiscrimination means only that an insurance company cannot refuse to permit people with disabilities to enter its facility and cannot refuse to sell insurance policies to people with disabilities). See also *Cloutier v. Prudential Ins. Co. of Am.*, 964 F. Supp. 299 (N.D. Cal. 1996)

In *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*,¹⁴⁵ the First Circuit clearly explained the fallacy behind the reasoning that Title III is limited to the prohibition of discrimination in actual structures. The First Circuit stated, *inter alia*:

By including "travel services" among the list of services considered "public accommodations," Congress clearly contemplated that "service establishments" include providers of services which do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.¹⁴⁶

The First Circuit noted that its interpretation is "consistent with the legislative history of the ADA,"¹⁴⁷ and concluded:

Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry. . . . [To] limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.¹⁴⁸

(holding that Title III applies to the sale of insurance policies); *Doukas v. Metro. Life Ins. Co.*, 950 F. Supp. 422 (D.N.H. 1996) (similar); *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316 (C.D. Cal. 1996) (holding that Title III governed a claim involving the denial of insurance, notwithstanding the fact that plaintiff did not allege denial of access to a physical facility). *Cf. Micek v. City of Chicago*, No. 98-C-6757, 1999 WL 966970 (N.D. Ill. Sept. 30, 1999) (applying the reasoning of *Doe v. Mutual of Omaha Insurance Co.* to state insurance carriers under ADA Title II).

¹⁴⁵ 37 F.3d 12 (1st Cir. 1994).

¹⁴⁶ *Carparts*, 37 F.3d at 19 (footnotes omitted).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 20. Other courts have agreed with the reasoning of the First Circuit in *Carparts*. *See, e.g., Pallozzi v. Allstate Life Ins. Co.*, 204 F.3d 392 (2d Cir. 2000) (finding that Title III regulates the underwriting practices of insurers); *Wai v. Allstate Ins. Co.*, 75 F. Supp.2d 1 (D.D.C. 1999) (finding that Title III prohibits the denial of insurance policies for individuals with disabilities that are equal to or comparable to those offered to nondisabled individuals); *Boots v. Northwestern Mut. Life Ins. Co.*, 77 F. Supp.2d 211 (D.N.H. 1999) (finding that Title III prohibits discrimination in the content of insurance policies); *Connors v. Me. Med. Ctr.*, 70 F. Supp. 2d 40 (D. Me. 1999) (finding that Title III applies to the substance or content of insurance policies); *Winslow v. IDS Life Ins. Co.*, 29 F. Supp. 2d 557 (D. Minn. 1998) (similar); *Chabner v. United of Omaha Life Ins. Co.*, 994 F. Supp. 1185 (N.D. Calif. 1998)

The fallacy behind the reasoning that Title III precludes an insurer from selling an insurance policy to a person with a disability, but does not preclude an insurer from writing or implementing policies that, either by intent or by design, discriminate on the basis of disability,¹⁴⁹ is equally obvious. That reasoning ignores the language of ADA section 501(c),¹⁵⁰ and it permits insurance

(holding that "Title III . . . applies to insurance underwriting practices"); *Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158 (E.D. Va. 1997) (finding that Title III prohibits discrimination on the basis of disability in the provision of insurance, regardless of whether insurance policies are purchased at an insurer's office or elsewhere); *World Ins. Co. v. Branch*, 966 F. Supp. 1203 (N.D. Ga. 1997) (finding that the scope of Title III extends beyond mere access to physical premises); *Baker v. Hartford Life Ins. Co.*, 6 Am. Disabilities Cases (BNA) 135 (N.D. Ill. 1995) (holding that Title III governed with respect to an insurer that only contacted prospective clients via mail or telephone).

The DOJ has consistently held that Title III governs with respect to the content of insurance policies. Thus, for example, the DOJ's ADA Title III Technical Assistance Manual provides that:

[A] public accommodation may offer [an insurance] plan that limits certain kinds of coverage based on classification of risk, but may not refuse to insure, or refuse to continue to insure, or *limit the amount, extent, or kind of coverage available to an individual*, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

DOJ, MANUAL, *supra* note 55, at § III-3.11000 (emphasis added).

¹⁴⁹ 42 U.S.C. § 12201(c) (1994). In *Doe v. Mut. of Omaha*, for example, Mutual of Omaha "stipulated that it 'has not shown and cannot show that [the allegedly discriminatory provisions in its insurance policy] are or ever have been consistent with sound actuarial principles, actual or reasonably anticipated experience, bona fide risk classification, or state law'" as permitted by section 501(c). 179 F.3d at 558. Nevertheless, the Seventh Circuit held that Title III does not govern with respect to the content of goods and services provided, and thus to the content of insurance policies. Because of this decision, Mutual of Omaha could not be challenged if, in contravention of section 501(c), it had indeed used the terms of its insurance policy as a subterfuge to avoid the principles of the ADA.

One reason given by the majority in this case for refusing to apply the principles of section 501(c) was that if the ADA applies to the contents of insurance policies, insurers would have to defend the terms of their policies by reference to section 501(c), which would require the federal courts to regulate the insurance industry in violation of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (which "forbids construing a federal statute to 'impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance'"). 179 F.3d at 563. The dissenting judge in this case, however, noted that (1) it was not necessary for the court to decide whether the policy complied with section 501(c) due to the insurance company's stipulation that the provisions at issue did not fall within section 501(c)'s safe harbor provisions and (2) the McCarran-Ferguson Act does not preclude the court from determining "whether an insurer may refuse to deal with disabled persons on the same terms as nondisabled persons." *Id.* at 566.

¹⁵⁰ 42 U.S.C. § 12201(c) (1994).

companies to provide goods and services that individuals with disabilities may not enjoy to the same extent as those goods and services may be enjoyed by individuals without disabilities. In short, like the reasoning that Title III's nondiscrimination mandate applies only to physical premises of a public accommodation, this reasoning flies in the face of ADA Title III's express intent.

Courts applying these two forms of reasoning to defeat the purposes of ADA Title III have again applied the "neutrality" precept of the Civil Rights Act to defeat the reasonable accommodation requirements of the ADA. Following Civil Rights Act premises, those courts have chosen to view the ADA as requiring equal treatment of persons with disabilities and have chosen to disregard the affirmative conduct requirements of the Act. Under civil rights principles it is sufficient that people with disabilities have equal access to insurance offices and, once inside those offices, have equal right to purchase insurance policies having the same contents as policies purchased by nondisabled persons. Changing the terms or contents of the insurance policies so that people with disabilities receive coverage equal to that provided to nondisabled people, however, requires affirmative action that goes beyond basic civil rights premises. These courts are not willing to read the ADA in such an expansive manner,¹⁵¹ and the ADA permits such a result by appearing to waffle between traditional civil rights and affirmative action precepts.

III. THE ADA'S POSITIVE EFFECTS, AND CAUTIONARY WORDS FOR THE FUTURE

Despite the flaws inherent in the ADA, the current situation is not totally bleak. There is some room for optimism. Notwithstanding its drawbacks, the ADA has helped in many respects to integrate people with disabilities into mainstream society. From a personal perspective, I can see significant changes.

Prior to the ADA's enactment, for example, *no* hotels or motels had TDDs or closed captioned television sets for the use of their customers. Although I am frustrated by the fact that, ten years after the ADA Title III requirement that all hotels and motels have that equipment available, many (maybe most) hotels and motels have still not complied with the law, I am well aware that during that

¹⁵¹ Indeed, in *Doe v. Mutual of Omaha* dissenting Judge Terence T. Evans tried to lessen the impact of the affirmative conduct required by analogizing that, in being asked to require an insurance company to provide nondiscriminatory coverage to people with disabilities,

we are not being asked to force a restaurant to alter its menu to accommodate disabled diners; we are being asked to stop a restaurant that is offering to its nondisabled diners a menu containing a variety of entrees while offering a menu with only limited selections to its disabled patrons.

179 F.3d at 565. The majority obviously was not persuaded by that reasoning

period more and more hotels and motels *have* acquired both TDDs and closed captioned TVs. This is progress.

Similarly, since enactment of the ADA more and more entities have acquired TDDs for their own use, thus enabling me to communicate with those entities directly on the telephone. While I am frustrated by the fact that all entities required by the ADA to acquire TDDs and implement TDD lines have not yet done so, and that some entities that have acquired TDDs and installed TDD lines do not answer their TDD numbers (making TDDs virtually useless), the fact remains that progress *has* been made. I can now directly call many entities on TDD that I could not call ten years ago. Moreover, relay services, not generally available ten years ago, are now available nationwide. This is progress.

In addition, some public accommodations and state and local government entities have voluntarily complied with the ADA and have willingly made their programs and activities accessible to me—for example, the university theater that provided me with an oral interpreter so I could attend and understand a play.¹⁵² While I am frustrated that not *all* public accommodations and state and local governments have complied with the law, again the fact is that progress *has* been made. I, for one, am grateful for that progress.

The drafters of the ADA recognized at the onset that the Act would not, in and of itself, serve to fully integrate people with disabilities into mainstream society. The ADA was expected to serve as the starting point or impetus to foster a change in societal attitudes toward people with disabilities. Unfortunately, progress is slower than many people had hoped or anticipated, which is due in significant part to the fact that many courts have not been receptive to the principles upon which the ADA is premised and have not helped to foster promotion of those principles. Nevertheless, progress *is* being made.

First, the ADA has served to raise the expectations of people with disabilities. People with disabilities now feel that they have the right to ask for accommodations and to expect reasonable accommodations to be provided for them. That is a necessary step toward changing societal attitudes. Experience has shown that if people with disabilities sit passively and do not actively request or demand necessary changes, society will not make the necessary changes of its own volition.

Second, as previously noted, some people and entities are voluntarily providing the accommodations required by the ADA, which has served to make some segments of society accessible to some people with disabilities. As more entities become aware of the lower-than-touted costs of many accommodations,¹⁵³ more entities may begin to voluntarily provide such accommodations.

¹⁵² See *supra* note 5.

¹⁵³ See, e.g., Blanck, *supra* note 36 (citing studies showing the average cost of two-thirds

Third, at least some courts *are* supporting the principles upon which the ADA is founded and *are* enforcing the ADA. Furthermore, the regulatory agencies responsible for enforcing Titles I through III of the Act have consistently been making headway in enforcing the ADA.¹⁵⁴

Fourth, the ADA has made society-at-large aware of the issue of disability, and has required the public to devise means of making society more accessible for people with disabilities in the future. In recognition of the fact that it is much more expensive to retrofit facilities to make them accessible to persons with disabilities rather than to build accessible facilities in the first instance, both Titles II and III of the ADA require newly constructed and altered buildings and facilities to be fully accessible to people with disabilities.¹⁵⁵ In this regard the ADA is forward looking. A very significant benefit of the ADA, therefore, is that it is helping to build a future society that will be more accessible to people with disabilities.

Despite these positive effects of the ADA, the issue of societal backlash remains of serious concern. At this point in time, society-at-large is not willing to embrace the principle that people with disabilities should be provided with what is generally viewed as "special entitlements" to achieve the goal of full integration into society. To reduce the effects of societal backlash and to aid in preventing further backtracking from the ADA's goals, individuals with disabilities must give full recognition to the "reasonableness" premise of the ADA's accommodation requirement. Thus, for example, an individual with a disability should not refuse to take reasonable mitigating measures that would substantially ameliorate the ramifications of that disability and then expect employers or program administrators to provide costly, burdensome, or special accommodations that would not be necessary if appropriate mitigating measures were taken. The purpose of providing reasonable accommodations for individuals with disabilities is to level the playing field for such individuals so that they may have equal opportunity to engage in employment or programs. If the individual could take mitigating measures to correct the disability to such extent that the need for accommodations is obviated, the individual should not

of accommodations provided for employees with disabilities as less than \$500).

¹⁵⁴ Both the EEOC and the DOJ have negotiated untold numbers of settlements in cases in which plaintiffs alleged that defendants discriminated in violation of the ADA. Under those settlement agreements the defendants have willingly agreed to modify their practices and procedures to comply with the tenets of the ADA. Settlement agreements and consent judgments negotiated by the DOJ, for example, can be found at ADA Settlements and Consent Agreements, at <http://www.usdoj.gov/crt/ada/settlemt.htm> (last modified Feb. 12, 2001).

¹⁵⁵ 42 U.S.C. § 12183(a)(1) (1994) (Title III); 28 C.F.R. § 35.151 (1999) (Title II). Similarly, the ADA requires that newly purchased buses and trains and newly built or acquired transportation stations be accessible to and usable by people with disabilities. *See e.g.*, 42 U.S.C. §§ 12142, 12162, 12182, 12184, 12186 (1994).

refuse such mitigating measures and, at the same time, demand the provision of accommodations. In such a situation, the accommodations requested are not reasonable.

For example, some individuals who are deaf have embraced the concept of "Deaf culture" and take the position that deafness is a culture rather than a disability and that therefore "nothing is broken that needs to be fixed."¹⁵⁶ Many advocates of Deaf culture are strongly opposed to research geared toward curing deafness, because they view such activities as a form of genocide which will lead to the obliteration of the "Deaf race."¹⁵⁷ Thus, for example, Deaf culturists strongly oppose cochlear implants—a surgically implanted device that is capable of permitting some people who are deaf to hear via electrically stimulated electrodes placed inside the cochlea.¹⁵⁸ Deaf culturists believe that they should be able to refuse to have cochlear implants, or other restorative devices or techniques that scientists may develop, such as nerve regeneration, even if such devices or techniques would enable them to communicate normally in most situations, including on the telephone. At the same time, however, Deaf culturists assert the right to be protected under the ADA and other laws prohibiting discrimination on the basis of disability and to require interpreters, telephone relay services,¹⁵⁹ and other accommodations to be provided to enable their participation in the workforce and in programs available to others.

¹⁵⁶ For an extensive discussion of this issue, see BONNIE POITRAS TUCKER, *COCHLEAR IMPLANTS: A HANDBOOK* ch. 8 (1998) [hereinafter *COCHLEAR IMPLANTS: A HANDBOOK*]. See also Edward Dolnick, *Deafness as Culture*, ATLANTIC Sept. 1993, at 37–53 [hereinafter *Deafness as Culture*].

¹⁵⁷ See generally *COCHLEAR IMPLANTS: A HANDBOOK*, *supra* note 157; *Deafness as Culture*, *supra* note 156.

¹⁵⁸ A cochlear implant is an electronic prostheses implanted into the inner ear that partially performs the functions of the cochlea—the part “of the inner ear that transduces sound waves into coded electrochemical signals.” Thomas Balkany, *A Brief Perspective on Cochlear Implants*, 328 N. ENG. J. MED. 281 (1993). The cochlear implant is intended to remedy many of the effects of nerve deafness, the most common form of deafness. *Id.* Six to twenty-two electrodes are implanted into the inner ear and are attached via a magnet and wires to an external processor. In addition to the processor, the implanted person wears a microphone to pick up sound. The external processor sends coded information to the prostheses in the inner ear, which is a receiver-stimulator. The receiver-stimulator converts the coded information into electrical signals, which are passed to the electrodes. The electrodes stimulate hearing nerve fibers, and artificial sound is transmitted directly to the brain, bypassing the nonfunctioning portion of the ear. See e.g., Noel L. Cohen, et al., *A Prospective, Randomized Study of Cochlear Implants*, 328 N. ENG. J. MED. 233 (1993); Michael F. Dorman, *An Overview of Cochlear Implants*, in *COCHLEAR IMPLANTS: A HANDBOOK*, *supra* note 156 at 5–28.

¹⁵⁹ Deaf people may communicate on the telephone via use of a TDD—a telecommunications device for the deaf. When using a TDD, the telephone receiver is placed into two headset cups (similar to a modem) on a machine that resembles a small typewriter with a video screen and/or paper printout. The TDD user types a message on a keyboard, which

In the opinion of this author, such an attitude ignores the reasonableness precept of the ADA's accommodation requirement. Congress enacted the ADA to ensure that people with disabilities are not discriminated against "based on characteristics that are *beyond the control of* such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."¹⁶⁰ Congress did not intend to require employers and program administrators to incur costs or burdens or to provide special assistance to accommodate individuals whose physical or mental impairments may be corrected or substantially ameliorated by reasonable mitigating measures, for such correctable impairments are not "beyond the control of" such individuals.¹⁶¹ This is not to say, of course, that an individual should or could be *required* to take mitigating measures to ameliorate the ramifications of a physical or mental impairment. An individual may always refuse to take such mitigating measures. But it is unreasonable for an individual who chooses to remain disabled, when reasonable measures can be taken to ameliorate the disabling condition, to demand accommodations for that disability.¹⁶²

is relayed to a party on the other end of the line with a similar device. The receiver returns his or her message by typing it to the sender, and the conversation proceeds via typewriter and video screen or printout.

Because most hearing people do not have TDDs, a relay service is required to allow TDD users to communicate with non-TDD users. Thus, the TDD user calls a relay service, and a relay operator answers via TDD and places the call to the non-TDD user (or vice-versa). The operator then relays messages back and forth between the TDD and non-TDD users, typing messages for the TDD user and speaking messages for the non-TDD user. Title IV of the ADA requires all telephone services to provide 24 hour, seven day a week, relay services for individuals with hearing or speech impairments. See ADA § 401(a)(3), (b), 47 U.S.C. § 225(a)(3), (b) (1994) (amending § 225(a) and (c) of the Communications Act).

¹⁶⁰ 42 U.S.C. § 12101(a)(7) (1994) (emphasis added).

¹⁶¹ This assumes, of course, that it is economically possible and medically advantageous, after consideration of factors such as risk, side effects, and likelihood of permanent success of the treatment at issue, for the individual to employ the mitigating measure. Whether mitigating measures are medically feasible can be determined by looking to tort principles. In the tort context, it is held that a plaintiff in a personal injury case cannot claim damages for a "permanent injury" if the permanency of the injury could be avoided by reasonable medical treatment. Whether submitting to surgery constitutes a "reasonable" mitigating measure involves a determination of several factors, including the risk of the surgery, the pain involved, the cost of the surgery, and the probability that the surgery will have successful results. See, e.g., *Zimmerman v. Ausland*, 513 P.2d 1167, 1169 (Or. 1973). In *Hall v. Dumitru, M.D.*, 620 N.E. 2d 668 (Ill. App. 1993), for example, the court held that the plaintiff had no duty to submit to surgery to mitigate damages in her medical malpractice action where, inter alia, the surgery presented risks of enhanced or additional injury or the prospect for the plaintiff's improved health was slight.

¹⁶² For a comprehensive discussion of this issue, see COCHLEAR IMPLANTS: A

To reduce the backlash effects of the ADA, advocates for disability rights should also avoid overreaching by asserting the right of individuals with disabilities to *more* than equal opportunity to participate in the mainstream of society. Some commentators, for example, advocate for the requirement of job set-asides to assist individuals with disabilities in joining the workforce.¹⁶³ Professor Mark Weber argues that private employers should be required to set aside a certain percentage of jobs for employees with disabilities, for “something more than the ADA, something even more than the Rehabilitation Act’s obligation of affirmative action by federal agencies and grantees, is needed to get the bulk of the population of people with severe disabilities into ordinary employment and out of poverty.”¹⁶⁴ A discussion of the substantive merits, or lack thereof, of job set-asides is outside the scope of this paper. It is important, however, to mention briefly two significant reasons why such a requirement would be unwise.

First, the backlash effects of job set-asides are likely to be tremendous. A job set-aside program constitutes an extreme form of affirmative action in favor of people with disabilities, which has a tremendous impact on the nondisabled population. Requiring that jobs be denied to people without disabilities in favor of people with disabilities who may be less qualified than other applicants for particular jobs may be the straw that breaks the camel’s back in the area of disability rights. The backlash arising from a job set-aside program is likely to make the current strong backlash against the ADA look tame in retrospect. The courts have proved to be uncomfortable with the notion of reasonable accommodations, because they view such accommodations as a form of affirmative action, and courts are uncomfortable with notions of affirmative action. Establishment of new disability policy that requires blatant affirmative action—by requiring job set-asides or otherwise—will serve to reinforce the backlash against such affirmative treatment of individuals with disabilities, whether that affirmative treatment is in the form of reasonable accommodations or otherwise.

Second, job set-aside programs constitute a form of charitable assistance, in that people with disabilities are entitled to X number of jobs regardless of qualifications, which reinforces the abhorrent and socially unproductive

HANDBOOK, *supra* note 156. It is important to note, however, that an individual’s refusal to take mitigating measures should bear relevance to the question of whether it is reasonable to provide accommodations for that individual to allow integration into the mainstream. It should not bear relevance to the question of whether the individual is disabled and thus protected by the ADA and other laws prohibiting discrimination on the basis of disability. For a discussion of this distinction, see *supra* note 52.

¹⁶³ See, e.g., Mark C. Weber, *The Americans with Disabilities Act and Employment: A Non-Retrospective*, 52 ALA. L. REV. 375, at Part III.C. (2000).

¹⁶⁴ *Id.*

perception that individuals with disabilities are poor souls in need of charitable assistance.¹⁶⁵ To give voice to this outmoded charitable model of disability, rejected by Congress when enacting the ADA, would eviscerate the significant precept on which the ADA is based. That is, people with disabilities want, and have the right, to be treated in accord with their *abilities* rather than in accord with their *disabilities*. The damage that would result from such conceptual backtracking with respect to disability policy is so extensive as to be incalculable.¹⁶⁶

IV. CONCLUSION

In hindsight, it appears that premising the ADA on civil rights premises in general, and on the Civil Rights Act of 1964 in particular, may have in many respects served to hamper, rather than promote, the ADA's objectives. There is no immediate means of solving this problem. Given the current political climate encompassing a general disfavor of civil rights concepts, it would be unwise to ask Congress to amend the ADA at this juncture. Indeed, Congress might be more apt to lessen the protections granted by the ADA rather than to increase those protections. Significant changes in the manner in which people with disabilities are treated, therefore, must result from changing societal attitudes rather than from immediate modification of the ADA. Continuing efforts must be undertaken to educate both the courts and the public-at-large about the true meaning of civil rights for people with disabilities.

When enacting the ADA Congress recognized that the traditional civil rights model does not serve to provide equal opportunities for people with disabilities. Thus, Congress altered or expanded the traditional civil rights model by requiring that reasonable accommodations be provided for individuals with disabilities. Because of the differences between the structures of the nondiscrimination mandates of the ADA and the Civil Rights Act of 1964, Congress might have been wiser to state that the ADA was premised on basic "human rights" principles, rather than stating that the ADA was premised on existing civil rights principles. Congress did not forthrightly explain the precepts on which the ADA was based, however, and thus it is left to disability rights advocates to make the courts and the public understand that the provision of reasonable

¹⁶⁵ See *supra* note 3.

¹⁶⁶ By way of example, (1) employers will no longer be required to view and treat applicants and employees with disabilities in the same manner that they view and treat applicants and employees without disabilities, and (2) employers might refuse to hire people with disabilities who were qualified for jobs because they had already satisfied their job set-aside "quotas."

accommodations—albeit a form of affirmative action—constitutes a necessary component of civil rights for individuals with disabilities.

Despite the ADA's flaws, the Act to date has had numerous positive ramifications for people with disabilities. While the progress resulting from the ADA has been slower than many people had anticipated, progress *is* ongoing, and will continue hopefully to be ongoing. However, the June 1999 Supreme Court decisions in *Sutton v. United Airlines*, *Murphy v. United Parcel Service, Inc.*, and *Albertsons v. Kirkingburg*¹⁶⁷ are disheartening. Additionally, the possibility that the Supreme Court might eviscerate portions of the ADA in a case considering whether Congress validly exercised its power under the Fourteenth Amendment in abrogating state immunity from ADA lawsuits is frightening.¹⁶⁸ In light of the disturbing manner in which the Supreme Court decided its June 1999 trilogy of cases,¹⁶⁹ it is unclear exactly how far the Court will go in expressing its dissatisfaction with, or lack of understanding of, the ADA's underlying precepts.

¹⁶⁷ See *supra* note 52 and accompanying text. For a comprehensive article discussing the flaws in the Court's reasoning in those cases see Tucker, *supra* note 52.

¹⁶⁸ See *supra* note 53.

¹⁶⁹ See Tucker, *supra* note 52.

